LIMITING SCOPE OF INJUNCTIONS IN LABOR DISPUTES

HEARINGS

BEFORE A

SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

SEVENTIETH CONGRESS

FIRST SESSION

ON

S. 1482

A BILL TO AMEND THE JUDICIAL CODE AND TO DEFINE AND LIMIT THE JURISDICTION OF COURTS SITTING IN EQUITY, AND FOR OTHER PURPOSES

PART 4

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LIMITING SCOPE OF INJUNCTIONS IN LABOR DISPUTES

TUESDAY, MARCH 13, 1928

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to adjournment, at 10.30 o'clock a. m., in the committee room, Capitol, Senator George W. Norris presiding.

Present: Senator Norris (chairman).

Also present: Senator Robert M. La Follette, of Wisconsin.

Senator NORRIS. The committee will come to order. Senator Walsh, another member of the subcommittee is engaged in another hearing before the Public Lands Committee, and Senator Blaine has been called out of the city.

You may proceed.

STATEMENT OF JOSEPH A. PADWAY, GENERAL COUNSEL WISCONSIN STATE FEDERATION OF LABOR, AMERICAN FEDERATION OF LABOR, MILWAUKEE, WIS.

Mr. PADWAY. Mr. Chairman, my name is Joseph A. Padway, of Milwaukee, Wis., general counsel for the Wisconsin State Federation of Labor, and I have been such for 12 years prior to my taking up a position on the bench, which position I resigned, and am now again general counsel of the Wisconsin State Federation of Labor and affiliated unions in that State.

It is regrettable that I did not get a copy of these hearings yesterday so that I would have had them to peruse them and to have saved going over anything that may have been discussed fully in the hearings. Also, I obtained a copy of the bill but yesterday and have given it some thought, superficial, I think, because of the length of time. Therefore, if I go over something that has been covered quite fully by the proponents and the opponets of the bill, I hope I will be pardoned.

Now, I dare say that the committee has come to the conclusion by this time that there is a great deal wrong with the situation as pertains to injunctions in labor disputes. I am not aware that the committee has come to the conclusion as to some way of relief. I do not know. I am convinced that a change should be made. I have been convinced of that for some time.

Senator NORRIS. Let me say at the beginning, the committee will not confine itself to the bill that is the subject of our discussion in the hearings. We are not wedded to any particular bill. We would be

glad to have you comment on this bill, criticize it, and if you feel it deserves criticism, make any suggestions that you have to make about amendment of the bill, or any suggestion that has to do with an entirely new bill, if you think that the bill before us does not meet the conditions as you believe them to exist. We are anxious first to know whether conditions are such that there ought to be legislative relief, and if so, what that relief should be.

Mr. PADWAY. Addressing myself then to your first question, I can only say that so much has been written and so much is in evidence both from the reports before the various commissions and governmental bodies, and also in the decisions themselves that indicate and imperative situation and a necessity for relief of some kind, and some relief from the injunction evil. I call it the "injunction evil," and I will support that definition by what I am about to say.

Now, I believe it was during the administration of President Wilson that the Committee on Industrial Relations met and at that time made a report and I think in that pamphlet gotten up by Basil M. Manley, it was quite fully reviewed as to what the situation was with respect to injunctions in labor disputes. No doubt that has been before the committee and has been referred to time and again.

But that was so recent after the passage of the Clayton Act—I think that the Clayton was passed in 1911—that labor still had some hope. It felt that there was still quite a lot of hope in the Clayton Act. Then came the dangerous decisions construing the Clayton Act and it was found that because of the interpretations, that what labor had objected to in the previous decisions was left in there. It was found that the relief sought under the Clayton Act, the act did not protect labor to the extent, judged by the interpretations, that it expected. It was an economic measure. We thought that by that measure, even though it did embody some of the provisions already in the decisions codified, that is to say, we thought that there would be a liberal interpretation because of the expression of Congress, and that the expression of Congress would result in more liberal interpretation on the part of the courts by way of construction.

The court can take cognizance of measures which are remedial and give a liberal interpretation. That is done every day, even though they do give narrow interpretations to matters which are in derogation of common law; but even in those measures which are in derogation of common law, when they are remedial in character, and seek to bring about betterment of economic conditions, economic status, they are generally liberally construed. That has been done by the courts in many States in passing upon acts, such as workmen's compensation acts that have been passed by so many States; and in passing upon those acts the courts have been liberal, and so when the Clayton Act was proposed and passed we thought that we would meet with the same situation as to liberal construction, but we found that recently, particularly with the decisions that have been referred to, no doubt before this committee, as the case of Truax *v.* Corrigan, where the Supreme Court denied the State of Arizona the right of a constitutional amendment attacking and limiting the State courts power with reference to injunctions.

And the case of Deering v. Duplex, the court went further and held illegal a sympathetic strike, went further, in my opinion than the evidence warranted, and declared a sympethetic strike illegal.

That was done again in the Bedford Stone Cutters case, just handed down by the Supreme Court in the last year, as I recall, and the Tri-Cities case, on the question of picketing, is a denial of the plain provisions of the Clayton Act.

We consider that we have not gotten anywhere The very purpose of the act was to afford some measure of relief to labor. The Clayton act was to give labor the right to picket and things that are the concomitants of strikes; they were benefits given to labor, but not in excess of the benefits of the other side, but merely to meet the financial force and the economic force of those who controlled the positions of the employees; and it was to make more equal, more even, and to give labor the same advantages, or nearly the same advantages—I do not believe that you can ever consistently say that labor can ever be given the same advantages by legislation. But what happened? In the Tri-City case Justice Taft, in writing the decision went so far as to say: "Yes, labor; under the Clayton Act, you have the right to picket; the labor union has." We were conceded that right. He said that there was the right on the part of labor to picket in times of strike, although he disliked the word "picket."

But what happened? He limited the picketing to one picket. I think he did not like the term "picket" being a militant term, and designated that particular individual a "representative" of the union and then limited these representatives to one representative at each point of ingress and egress. That was the situation with regard to that. Conceding the right to picket theoretically, but denying it practically.

Now, that construes the Clayton Act, yet under the Clayton Act we are entitled to the right to picket. In fact, it went further than many of the decisions, although there were decisions before that which limited the right to picket, but as I said, it went further than any of the decisions, and being a decision of the United States Supreme Court, had a very, very bad effect upon the courts so far as the administration of these cases was concerned, for the Tri-City case was followed by the State courts. I can give my experience in Wisconsin. We have had many strikes there and when these injunctions came before the court, which my associates and I have had occasion to handle, we have found the courts adopting the expressions of the Tri-City case, although in our State it is within the discretion of the chancellor to issue the injunction or not, as he sees fit. But the judges, as a result of the Tri-City case, rather infer that they should follow the precedent established by Judge Taft and the courts have universally, in Wisconsin, whenever the question has been put to them, limited picketing to the use of one picket, no matter how large the plant, one picket to each entrance of the plant.

The judges take that position—while they will not say that they are taking it but that is what they do. They take it and infer from the Tri-City that picketing is limited to one picket no matter how large the plant. No matter how much we argue, or how much we endeavor to get them to interpret the decision in some other manner, we can not get the courts to change.

I will in a moment, refer to a situation that is pending this very day in Wisconsin. There is a strike on in Kenosha that will illustrate the argument I am making now.

With reference to the Clayton Act, which we have been discussing, we took that act in Wisconsin in 1915, and embodied it into our laws and it became a part of our laws in Wisconsin. The tendency of the courts seem to be, and of our supreme court there, to narrow and restrict the interpretation. There is a case arising out of a dispute between the employer and the employees in an automobile plant—the Munday case—which came under the provisions of that law, which is now on the statute book of Wisconsin.

When that case came up—the strike arose out of a difference as to the open and closed shop—the case came up as a result of the dispute as to the general conditions but the main difference seemed to be the question of the open and the closed shop.

The Supreme Court of Wisconsin held that a strike for the open and closed shop was not a strike involving the terms or conditions or labor, and therefore, was not within the purview of the Wisconsin "Clayton Act."

Now, I do not know how the court came to its conclusion. It gave some reason for it. The very act, the very situation that brought the Clayton Act into existence was the question of unionization. It was a union measure. It was a union bill. It was fostered, and asked, and prayed for by unions, so that they might organize, and preserve their organizations, and work out details incident to their organization policy, declare their policies which had even been declared by the courts; the courts admitted that unions were not unlawful conspiracies; that act, one of the fundamental ideas of it, was to permit unification in everything that might go with a union; yet that was declared by the supreme court not to involve a question of open and closed shop, that that did not involve the terms and conditions of labor, and therefore, that strike or the effect of it, and the acts as referred to in that strike, was therefore not within the protection of the act.

So in Wisconsin if that law were permitted to remain on the books of the State, the law that we had, which was the same as enacted by Congress, the Clayton Act denied us the right to strike for an open or closed shop, and denied us the benefits of the act.

Well, we went back to the legislature, the labor unions did, that is, with the help of our legislative committee and myself—we simply amended that bill in Wisconsin by cutting out some of the provisions which the court held limited the application and we put in the words "any dispute affecting labor." We amended it, made the act read so that it would say, "any dispute affecting labor" shall receive the advantages and benefits as set forth there, and that is the way the matter now stands. It has not been submitted or passed upon again by the supreme court. No court interpretation has been had as yet on the act as amended.

We found another situation. I am simply giving you this to show you how the courts have approached the subject as to interpretation of these various labor acts.

This is a little departure from the Clayton Act, but I want to refer to another act which we have in Wisconsin. We have an act in Wisconsin that says whenever a strike occurs in a plant it is necessary on the part of the employers or owners of the plant, in advertising for help, to state the fact a strike exists in the newspapers. The purpose of that is, so that men coming from a distance may be ap-

prised of the fact that there is a strike in existence and may not come, and generally it would be advantageous and of some help to employees engaged in the economic struggle.

Well, that matter came before the courts in the West Allis Foundry case. West Allis is a suburban city adjoining Milwaukee.

The courts held this, that while the law was constitutional, yet if the employer had been able to obtain sufficient help so that his production was not curtailed, a strike was no longer in progress, and it was unnecessary for him to advertise that there was a strike in existence. The case was brought to the attention of the State courts, as the result of a strike of molders and other men who were engaged in the same work and were members of the molders' union. The union had advertised and announced that a strike was in progress. None of the men on strike had gone back to work. They were still all out on strike, but they had taken up, because of the prolonged strike, taken up work in other shops; most of them had. As I recall, one or two were still picketing, carrying banners up and down in front of the plant. The employer had advertised and did not state that there was a strike on, and had thereby obtained help. Then the district atttorney was apprised of that fact, and a warrant was issued, and the case was tried in the criminal court. The court that tried the case found that the employer was guilty of violating the law.

Our supreme court said that the employer's statement to the effect that his production was no longer curtailed, that he had enough help so that the production, as compared with previous production, previout to the strike was par, that, under such circumstances, no strike was in progress.

I think that, from the very fact that they were advertising for men, for help, would indicate that that was not a fact, but the employer contended, under oath, swore to it, that the additional help was needed to increase production, that he had gotten to a point where the production was equal to and even larger than it was before the strike was declared.

Well, when that law was nullified we had to go to the legislature; I was then a member of the Senate of Wisconsin; we drew a bill; that is, the Wisconsin State Federation of Labor legislative committee and myself; we planned and we drew a bill which defined when "a strike is in progress," and so we have on the statute books in Wisconsin, and have had since 1925, a law which says that a strike shall be deemed in progress when the general concomitants of strikes are in existence, and when an international union, or a national union declares that it is in existence or when there is picketing going on, or when any of the former employees are not back on their former jobs.

The bill was bitterly fought. Thanks to the assistance of Senator Blaine, then governor, the bill was passed and promptly signed. It is now a law.

We have in Wisconsin a law which I would like to suggest, seeing that you ask for some suggestions as to other bills and new bills. We have on our statute books a law that says before an injunction or order may issue in labor disputes notice shall be served upon the other side at least 48 hours previous. This is a specific limitation. The limitation in the Clayton Act is general and of no force.

Now, many of the opponents of that measure, I remember, when it was before the committee of the Wisconsin Legislature, in the committee hearings, many of the opponents contended that it was unconstitutional, and that it was an act that was going to limit the jurisdiction of the courts. They also contended that there would be irreparable damage if the courts should have to wait 48 hours. "Why," they said, "in 48 hours' time they can destroy the plant" and that they can do thus and so. And they pointed out various things in alleged justification of their position. They said that it would be disastrous if they had to wait. Well, we have that act on our books now and have had for about three years. We have had some strikes, and they have not proven disastrous at all. We have found that generally it has had a very good effect in that injunctions were not applied for in many instances of the dispute.

And I would suggest that whatever measure is had that some limitation of that kind be included. The constitutional test of it may be had later. I think for the time being it would be well to enact, in connection with any measure, this measure or any other, a limitation that notice shall be served upon the other side at least 48 hours before an order issues. My reason for it is this: The injunctions that are generally signed by judges in labor disputes are those which are prepared by lawyers in the employ of the employer. They are able lawyers. They have studied the injunction procedure and know it very well, and the language that goes in there usually is based upon general allegations as to a conspiracy and everything else perhaps murder, including that, too, and of course, it is claimed that when such allegations are made under oath and submitted to the judge that he must issue the injunction they request; and the injunctions, in general, all follow the same form. Under the procedure everything is admissible and they insist that everything is going to happen, as was brought out in the recent hearings in connection with the railroad and coal strikes, which is familiar to this committee.

But the injunction is based upon those allegations. Now, if 48 hours' notice could be given to the other side it would do this, it would give an opportunity to the labor union and its attorney to go before the court and argue the matter before the court will sign the blanket form of injunction that is submitted. Once that is signed we find that we have great difficulty in obtaining any change. It it is not changed before it is signed and submitted we find that it is very difficult to obtain a change afterward. The judge is very likely to say that it has been signed and let it go at that. It is signed and then it stands as a temporary restraining order.

We find that these temporary restraining orders are uusually ex-parte orders and the judges are usually inclined to leave them stand and not modify them. We have great difficulty in obtaining a modification. But if the judge has not yet issued the injunction, if notice must be served on the other side, and we go before the Federal court, or any other court, State court, and we argue the matter as to what ought to be excluded from that injunction, generally some of the arbitrary provisions will not go in, because there is opportunity to make reply to the court, and to show the court what the true situation is and to have the whole story before the court. And, so, I say, Senator, although it will be contended

that it is unconstitutional by some, that this committee ought to include some provision in framing a bill that is similar to the provision which is contained in the Wisconsin bill. I think that the committee could do that. I suggest a provision similar to that. I do not think that it will be declared unconsititutional as being an unreasonable limitation upon the powers of the equity courts.

Now, it may be asked by the opponents if this has been passed upon by the courts of Wisconsin. It has not. It will be some day, no doubt, but it has not been yet passed upon.

But I can not see any reason at all as to why a limitation of 48 hours in labor disputes should at all be as drastic as to contend that in that time, in that period of time, there will be a general destruction of property. If there is to be, the injunctional order will not have the effect of preventing it.

Senator NORRIS. Now, since you have had that law on the statute books of Wisconsin have there been injunctions issued?

Mr. PADWAY. There have been injunctions issued.

Senator NORRIS. Many of them?

Mr. PADWAY. No: not a great many: about three, I should say.

Senator NORRIS. Was the question raised before the lower courts as to its constitutionality?

Mr. PADWAY. No: it was not raised. The provision is operative. I understand the orders were signed until after that period.

Senator NORRIS. Has it resulted in any destruction of property?

Mr. PADWAY. It has not. That has not been the situation at all. And when it is necessary to obtain an injunction order immediately to prevent the immediate destruction of property, does it not occur to one that the police force and the marshals and the sheriffs are the people to prevent all of that? Will the injunctional order served upon men about to destroy a plant like we are led to believe they they are about to do from the way these matters are brought up—will they, if they are disposed to do that within 30 minutes, have any more respect for the injunction, or listen to that which is, I may say, a script and couched in formal language which the members or the men on strike do not usually understand until it is explained to them—will that prevent them from doing that which they would do without it? Is it at all possible to conceive that? Is not that a situation for the police force or the sheriff's force or the marshal's? They can for a period of 48 hours' time take care of such a situation as that.

The injunction, of course, when it comes to the question of the injunction preventing anything, it will not prevent anything but what the sheriff, the police, and the marshals could prevent. They could prevent it just as well, except that they can not prevent the payment of strike benefits. That is not within the purview of the duty of a sheriff, or the police or the marshals. As to those things, I contend that it is reprehensible to issue injunctions; yet, as to matters of that kind, they can be reached by an injunction issued after notice; but the things generally sought by injunction, the immediate effort of ex parte injunctions are things purely within the power of the police to prevent, and things that they ought to prevent: but an injunction can no more reach those things, an ex parte injunction, or dispose of them than any other court order. The fact that there is a court order prohibiting it, does not prohibit a man from commit-

ting arson or vandalism if he is so disposed. Those are acts which are criminal. They are crimes against the State, offenses against the policy of the State and the law already prohibits them; that should be within the purview of the police and not within the field of injunctions.

An injunction should not be used, as a police measure, for the curbing of crime. But it is.

It is usually urged that there will be murder, violence, crimes committed. That is the thing that generally brings about ex parte injunctions, but the injunction should not be used for the purpose of preventing those things. If the men are going to obey the laws by injunctions which they are obliged to obey without them, why can not the police enforce them. If a man is going to disobey the law, an injunction will not restrain him. No man is restrained from burning down a house because there is an injunction which restrains him from burning it down. He has no right to burn it down anyhow. The law prevents him from doing that, just as much as the injunction does. He is not prevented from doing that by an injunction, but by the general laws of the State. That is the declared policy of the State, by statute, or police authority.

That, to my mind, convinces one of the absurdity of the injunction for preventing crime, and therefore I say that 48 hours' notice is not going to result in irreparable injury.

Neither is it going to impair the objects sought to be prevented by injunction and lack of 48 hours' notice will not in any way deter those from committing acts which it is alleged that they commit. The provision ought to be incorporated in the bill. It will be of great advantage and benefit to labor and labor unions, if they can be given an opportunity to come into court before the chancellor and assert their rights as they relate to the particular strike and acquaint the court with the facts before the injunction is issued at all. I hope that that can be included. I think that the Supreme Court would sustain the constitutionality of that provision, as it is not unreasonable.

That is a constructive suggestion that I offer to the committee. That is a thing that I think worth while.

Now, what is happening to-day; we have a strike in Kenosha, full-fashioned knitting and hosiery workers on strike. There is a plant that employs about 300 workers, perhaps more in that particular department, and all but about 20 are out on strike. The strike is still in progress. The strike has proceeded for a month, and there have been no acts of violence of any consequence except two, and those two were the throwing of bricks through windows into the homes of two strike breakers, and in those instances—this is merely the opinion of the union officials and of myself, that it is the work of a private detective agency, industrial engineers as those particular individuals style themselves, who have engaged men to commit those acts so that their employment, the employment I mean of the private detective agents can be prolonged.

Now, we have questioned every individual member of that organization pertaining to these incidents, and every striker has emphatically denied that he committed any such act, and we have every reason to believe them. And then, Kenosha is a small community, made up of people who are not given over to any of that kind of

work at all. If they wanted to do anything of that kind there in much more opportunity to commit offenses or crimes of that kind than of throwing bricks through windows.

I think that has been the only two occurrences of consequence. And, as I say, it is the belief of the officials of the union, and my belief, that that was done by these private detectives employed by the company.

Senator NORRIS. What is the nationality of these employees on strike?

Mr. PADWAY. These employees, I think, are 75 per cent American. In the hosiery industry the employees are very young, perhaps averaging from 20 to 45 or 40 years of age. When they reach 40 or 45 it affects their eyes and they have to quit, consequently you do not find any old persons working in that industry.

Senator NORRIS. Well, are they men or women?

Mr. PADWAY. They are about—they are about two-thirds men and one-third women in this particular strike.

Now, there is a situation where over a month, or a month and a half, this strike has been in progress. These instances of the bricks I have referred to happened about five weeks ago. No injunction was asked for. They went along, I suppose, thinking that they might settle their controversy. I do not know. But everything went along all right. The statute, likewise, when the injunction was issued, was the same, Mr. Chairman, as it was two weeks before that, or practically as it was one day after the strike, for that matter. When the bill was filed with the Federal judge of our district court it was set forth in the terms of—well, the usual terms. They set out that there was a conspiracy on foot, and that there would be terrible things happening and that the injuries will be irreparable, and all of the usual allegations that call for the most drastic injunction.

I neglected to bring a copy of the injunction with me. It is now on the way here by air mail, but I wired for quotation of some of the drastic provisions in that injunction, and I will take occasion to refer to them. It is quite likely I did not bring them here with me. I thought I had them. I will state what those are and then I will send a copy of the injunction to the committee, if I may do that.

The injunction, among other things, limits the rights with respect to picketing and with respect to walking in the vicinity of the plant and the streets adjacent thereto, and then limits every form of picketing. It is the most drastic injunction that has been issued in the State of Wisconsin within my experience. Picketing of every kind is prohibited and every kind of restraint is given by the Federal court in this order.

Senator NORRIS. Is that done, is that injunction issued on the theory that your law does not apply to the unionizing of the mill?

Mr. PADWAY. No, sir; that is not in dispute here except indirectly. It is issued upon the allegations and complaint that these men will commit these particular acts. The bill in equity says that they will do terrible things, that there will be the destruction of property, and there will be acts of violence to persons there. There has not been an act of any consequence during the time of the strike, and no trouble of any consequence on the picket line in over a month.

Senator NORRIS. Was that injunction issued without notice?

Mr. PADWAY. That injunction was issued without notice, sir. It was an ex parte injunction.

Senator NORRIS. Has there been any move made to modify it?

Mr. PADWAY. There has not, because it was issued last Thursday, and I was on my way to Washington on Friday; I have not asked for a modification, because I have felt that two or three days might not disrupt our ranks. If the injunction is continued longer, I am afraid that it might, and I have already dictated my papers for a modification of it; but if it is denied, I do not know what will be the end. I think that it will probably disrupt the strike. It will weaken it and break it. We can not cope with the situation if they are permitted to go out into other fields and bring in strike breakers. If we are permitted peaceful, picketing, strike breakers will not come in.

Senator NORRIS. What were the issues, and what caused the strike?

Mr. PADWAY. The issue there is this: On a certain day the plant, Allan-A Company, Allan-A plant announced it would change its method of production; that is, knitting machines are controlled by expert knitters, and there is one knitter to every machine. It is proposed to put one knitter on two machines and give him one helper, or two helpers. That is the situation, two helpers and one knitter. Within the course of time it is expected that these helpers will be knitters and at the present time while it will just limit the number of knitters to be had, because it is a highly skilled work, ultimately they will have a surplus of labor, and with the surplus of labor they will be able to bring down wages. At the present time wages in the knitting industry are fairly good. Men earn in the neighborhood of sixty and sixty-five dollars a week.

It is not high when you consider that it takes young people in the industry and at about the age of 38 or 40 they have to leave the industry because their eyesight becomes impaired, and are otherwise physically impaired as a result of the work they are engaged in; but for the time being it is an industry that is fairly well paid and there is not an oversupply of workers; but the tendency is by creating more knitters and through the employment of these helpers to have more knitters, have an abundant labor supply, and in that way they will be able to reduce the wages that are now paid. Now, the economic trouble involved there is as to the future, and it is simply a case where the union saw that situation and so they put it up to the employer. They went and asked for a conference with the employers, for the leaders of the union and the owners of the plant to hold a conference. Otherwise things were satisfactory. Wages were satisfactory—hours and employment and conditions. Everything else was satisfactory to the employees, except they did not want to see a situation brought about whereby their wages would be lowered as a result of surplus of knitters and their health impaired by working two machines. They did not want to see a situation brought about whereby they might either lose their position or be made to come down so low in the future in wages by competition with surplus labor.

Senator NORRIS. Well, what plan to this time had been the method of training apprentices under the old system; how did they learn the business; how did they manage to become skilled in it?

Mr. PADWAY. One apprentice to two, three, or four knitters, as many as may be required. But now the situation is that there shall be one knitter to two machines, and two helpers.

Senator NORRIS. You do not get my idea. I mean prior to this time, when this change was made. Prior to the time this change was made, what was the method of training apprentices? Suppose that I wanted to become a knitter, wanted to become an expert in that line of business, how would I go about it?

Mr. PADWAY. Just by being apprenticed to the knitter, the expert knitter. That is the only thing. It was done the same way then as now.

Senator NORRIS. Yes.

Mr. PADWAY. Except that now there are two apprentices to one knitter. If there are 100 knitters there would be 200 apprentices?

Senator NORRIS. Yes.

Mr. PADWAY. Whereas formerly if there were 100 knitters there would be, say for example, only 25 apprentices, you know, or just the necessary number to take care of the industry.

Senator NORRIS. I understand. The union's position is that the high number of apprentices they have now is unnecessary.

Mr. PADWAY. They will be unnecessary in number. If the apprentices are doubled that will reduce the number of knitters that they have. The fact is that just before the strike, I think, two expert knitters were discharged and let go because their places were taken care of by four apprentices; they will have a surplus of labor, and by figuring that way they will be having many apprentices; labor will be cheaper for them. The union claims that it will be more expensive to operate the mill. That is merely a matter of issue. I do not know. I am not convinced of that. They will have so many apprentices that they will simply displace expert knitters. That is an economic struggle that has given rise to this situation.

However, the point I want to call to your attention in connection with that strike is this, Mr. Chairman: The men did not want to go on strike. They wanted to remain at work and to confer with the employers. I forget the time now, the dates, but I think it is somewhere near a month ago, or five weeks ago, the employers tacked up a sign on the door of the plant—I do remember the date now, February 11 or 15, which read as follows—I do not know the exact wording. I will get a copy of it in connection with this bill, in answer to your question in connection with that, and I will send it to you; but it said, in substance, that from to-morrow this plant is on a nonunion basis, only nonunion employees, only employees who are not union—I do not think they used those words, but only men who are not members of the union may return to work.

This was not a question of a strike brought on by the union. It was action taken by the management. It was a lockout, as is known to labor circles. It was a lockout. In other words, the employers told these men they could only return if they returned as nonunion men. That is, they had to be nonunion men. The union men could not do that, or would not consent to return to work on that basis.

Senator NORRIS. What happened the next day?

Mr. PADWAY. Next day, out of about 320 persons, 300 refused to go back. There were about 320 employees, and about half of that number were members of the union, but 300 of them did not return to work, would not return to work upon that basis. The union was sufficiently influential in talking to those who were not members of the union and asked them not to return, and they did not return.

Picket lines were instituted—more than one picket, more than 10, perhaps two or three dozen—and as employees went to work there pickets would talk to them, and it had its effect in maintaining the strike or lockout. They brought almost everyone out, for there are but about 20 persons working there now.

Senator NORRIS. Well, are they getting new employees?

Mr. PADWAY. Well, I do not think that they have many employees in there now. They probably have 25 or 30. What they are doing, they are filling their orders, but they are doing it by having their goods manufactured and sent in from other cities to the Allen-A Co., and then they are shipping it out, filling their orders in that way. They have not yet replaced their employees. At least, they have not as long as the picket line was in existence.

Then there came this injunction, and the officers of the union and the members of the union were called in. I called them into conference—all of those engaged in this strike—and told them that so far as the injunction was concerned, "You must obey it, and you will have to take the pickets off the line."

There is only one thing that the able counsel who prepared this injunction overlooked, and that is sympathizers—wives and daughters of members—and so we are able as yet to act through them. If they had asked for a modification of it to include them, I probably would have had to have remained there, let this invitation go, and stay there, if I had thought it would limit them or apply to the sympathizers. If it applied to the sympathizers, it would be disastrous to our strike.

Now, with the wives and daughters and sympathizers of the employers we are maintaining a very effective picket line. I do not know in my absence now what is going on. I suppose, seeing the sympathizers are omitted from the injunction, what I suppose they will do—it has been done before in the steel strike, which I handled in 1920 or 1921—I suppose they will ask to have it amended. I do not know just what they will do. It all depends, I assume, on the present outcome. I am not going to pass on that—that is, pass my opinion on it—but I suppose they will ask for it; but we have been able to maintain an effective picket line with the wives and daughters and sympathizers, one which will, I believe, keep things in status quo.

But, I direct your attention, Mr. Chairman, to this: It is the policy, Wisconsin has declared it as its policy, and the Federal judge there; and I want to say this, although not intending to be personal, that our Federal judge there is a just man and is, I think, as fine a man on the bench as any man could be. He is not at all personally inclined, as are some Federal judges, to take a position against labor. He is manifestly fair; but the injunction was asked for and, acting upon the authorities and the decisions, he was within his power in doing the very thing he has done. I had, of course, expected that since the Federal courts do in many instances follow the policy determined by the State courts, where there is nothing to the contrary or no constitutional question is involved, I had expected that the injunction would not be as drastic as it was, and would have relied on our State law and asked that notice be served of at least 48 hours before the return of the order to show cause on the workers and the union before using a restricting order.

Senator NORRIS. Now, in their petition what did they allege that gave the Federal judge jurisdiction rather than the State courts? What Federal question was involved in it?

Mr. PADWAY. I think there was diversity of citizenship in the case. I do not want to make that as an absolute statement, but I think that is the situation and that the Allen Co. is not a Wisconsin corporation. I think that they alleged diversity of citizenship.

Senator NORRIS. From your experience and observation, what would happen, to what extent would injunctions in labor disputes issued by Federal judges be reduced if Congress passed a law taking away from the district courts, Federal district courts, any jurisdiction on the ground of adverse citizenship? Would that help the situation any?

Mr. PADWAY. I can see that it would, unless unconstitutional.

Senator NORRIS. We have a bill before us, pending before this committee to do that.

Mr. PADWAY. If that were done, it would extend that work, of course, to the State courts.

Senator NORRIS. Would there be any constitutional objection to the passage of that kind of a law?

Mr. PADWAY. I am not prepared to say. I would say, using my academic knowledge, to be as frank with you as the question is put, I am fearful there would be.

Senator NORRIS. We would like to have your opinion.

Mr. PADWAY. I am fearful that there would be. I am fearful that the Supreme Court of the United States would declare a law of that kind unconstitutional.

Senator NORRIS. The reason why a Federal judge has jurisdiction——

Mr. PADWAY (interposing). Is by act of Congress.

Senator NORRIS. In cases of that kind, I mean by virtue of adverse citizenship, is because Congress has passed a law giving them jurisdiction. On that ground can not Congress take that away?

Mr. PADWAY. I do not think that you could take away the jurisdiction to adversity of citizenship between citizens of different States; take that out of the Federal courts. I think that that would raise a constitutional question.

Senator NORRIS. Yes; but the district court is just a creature of Congress, and every jurisdiction, every Federal jurisdiction it has comes from congressional acts.

Mr. PADWAY. Then, may I answer that by another question?

Senator NORRIS. Yes.

Mr. PADWAY. And say this: Could Congress in an act deprive the district courts of juridiction in equity cases entirely?

Senator NORRIS. Why, I do not see why not.

Mr. PADWAY. Putting it to me that way, I am inclined to agree with you.

Senator NORRIS. Let me make this suggestion.

Mr. PADWAY. Yes.

Senator NORRIS. Under the law as originally passed a great many years ago, these district judges had jurisdiction by virtue of adverse citizenship in cases involving $2,000.

Mr. PADWAY. $3,000 now, is it not?

Senator NORRIS. Well, I think at was at one time $500.

Mr. PADWAY. Yes.

Senator NORRIS. It was then increased and has finally been brought up to $3,000 now. Unless $3,000 is involved in it they have no jurisdiction on account of adverse citizenship now.

Mr. PADWAY. No.

Senator NORRIS. They formerly did have. Congress took that away by changing the statute. Could not Congress say now that they could not have jurisdiction in cases where a million dollars was not involved, or less than a million dollars, if they can change it from $500 to $1,000, and from $1,000 to $3,000? Why can not Congress increase it without limit and virtually take it away entirely?

Mr. PADWAY. I am not inclined to agree that Congress could take it away entirely. I might advance another reason that has just occurred to me, and that is this: The question I put was the question as to whether Congress could deprive the Federal district courts of equity jurisdiction. I think that Congress could. Why not create the district courts into courts of law, provide that they should have jurisdiction over law questions only? I think Congress could do that.

I was a judge in a court of law. I had no equity jurisdiction, no jurisdiction over equity cases at all.

Senator NORRIS. Congress can abolish the district courts if it wishes?

Mr. PADWAY. Yes, sir; and the question also, of course, is conceded among lawyers, and it is elemental that the jurisdiction of the Federal court is that which Congress gives to it, and I think that Congress could simply declare the Federal courts to be courts of law. For instance, say that the district courts are courts of law, district courts of the United States; and then there could be created separate chancery divisions; likewise Congress could refuse to create chancery divisions.

Senator NORRIS. Why could not Congress say, by law, that hereafter no district judge should issue an injunction in any case? Now, I am not contemplating such a law. I do not think anybody is. I am only using that as an illustration of the power of Congress in the matter. But the reason they issue injunctions is because of the power that Congress has given them. Why can not Congress take it away?

Mr. PADWAY. I can not see why not, unless it come in some way in conflict with the prohibition against depriving citizens of property without due process of law.

Senator NORRIS. Well, they will still have the State courts to go into.

Mr. PADWAY. Yes; they will still have the State courts to go into, but have they not the right to go into the Federal courts in case of adverse citizenship? Is that not a constitutional guaranty?

Senator NORRIS. Originally, we did not have such a thing as a district court, when the Constitution was adopted——

Mr. PADWAY. No; we had the United States Supreme Court and such inferior courts as the Congress may from time to time ordain and establish.

Senator NORRIS. Until the Congress established the district courts we did not have them.

Mr. PADWAY. Yes. And Congress abolished the circuit courts. That was abolished entirely.

Senator NORRIS. Yes.

Mr. PADWAY. I forget when that was abolished, but it was in 1912 or 1913.

Senator NORRIS. Several years ago.

Mr. PADWAY. Congress abolished the circuit courts. Now, if they could abolish the circuit courts, or the circuit courts of appeals, they can abolish the district courts. I will change my statement that I made at the outset, that Congress could not.

Senator NORRIS. It has been argued before the committee here, by able attorneys, that we could not do that.

Mr. PADWAY. I do not know why not.

Senator NORRIS. But nobody has given a satisfactory analysis of it, to my mind. It is conceded by everybody, so far as I know, that we change the jurisdiction, we can modify it, or alter it at any time, but it is claimed that we can not, having once given jurisdiction to the courts, that we can not take it away entirely. Just where that line is seems to be very indefinite, and if you can show us just where that line is, if there is such a line, I would like to see it, have it pointed out.

Mr. PADWAY. Well, I would not want to, at this time, suggest anything along those lines, because I am not equipped or prepared to discuss it at length. I simply say, because you have put the question to me, I can't see why, by congressional act, why the jurisdiction can not be greatly limited, or the court entirely abolished. Now, it occurs to me that that might be done.

Senator NORRIS. It is conceivable to my mind that it would not only have the power, but that if the right kind of law were enacted you could simplify the procedure very greatly and lessen the expenses immensely, if we abolished all courts below the Supreme Court and then made, by proper provision, a way of going from the State courts to the Supreme Court of the United States. I do not see where there is any constitutional provision that would come in conflict with my suggestion.

Mr. PADWAY. Would that be a practical suggestion? And could the Supreme Court of the United States take care of all of the work?

Senator NORRIS. It would all depend upon the cases that the law permitted to come up, and I should think that it would not increase the work of the Supreme Court any. Instead of having two systems here running side by side, with their immense overhead expense, we should only have one. Our judicial procedured, it seems to me, taking the State and Federal courts together, is a very cumbersome affair, with the result that it costs the taxpayers immense sums sums of money to keep them going. You can go into a State court, as I hava done just as a matter of curiosity, in the same city, and go from the district court of the United States, where they are trying a case, where I made a visit, they happened to be trying a liquor case before a Federal judge, and I listened to it for quite a while, and then I went over to the State court and they happened to be trying a liquor case. They were both the same. They were operating, one a Federal court and the other a State court, each one with all of its overhead, all of its marshals in the one case and deputy marshals, and criers and in the other case sheriff, and his deputies, but there were two systems of jurisprudence side by side.

Mr. PADWAY. Well, how would you try those cases where there is a violation of an act of Congress? Congress passes a prohibition act. It annexes penalties. There has been a violation of the law. Now, that is a violation of a Federal law. Will you then, will Congress vest the jurisdiction in the State courts?

Senator NORRIS. I am not apt in my illustration, because Congress has passed under a constitutional provision, a prohibition act, and of course that probably gives the Federal courts jurisdiction.

Mr. PADWAY. Yes.

Senator NORRIS. But in the most of these cases that illustration would not apply.

If you come from Wisconsin to Nebraska and sue me on a promissory note, and you do it in a Federal court. Five thousand dollars, we will say, is involved in it.

Mr. PADWAY. Yes.

Senator NORRIS. Now, if the law I have suggested were passed you would have to sue me in the State court, and why shouldn't you? If you come to Nebraska and you commit murder then you are tried in the State court, where a human life is at stake. If you are so afraid of that State court, where you have $5,000 involved, you ought to tremble when your life is at stake in the same court.

Mr. PADWAY. That is an apt illustration. I am not going, of course, into the feelings of the people of the community as a whole in the different States, citizens of different States, desiring to be tried in the Federal courts, when there is a diversity of citizenship. I am not going into that. There was probably a basis for it, but I can not see why that can not be so. Here you can go in and try cases involving property in the State courts, even though there is a diversity of citizenship.

Senator NORRIS. I can see originally that there was a reason for defending citizens of one State from the citizens of another State by permitting them to get into Federal courts, on the theory I suppose, that there may have been something to it 100 years ago, on the theory that the State court would be prejudiced if you come to Nebraska, because you came from Wisconsin; but that is not true now. Now, no lawyer who has had experience will claim that there is anything in that. If you get into the State courts that may not be as good, but as I live in the State of Nebraska, if I want to commerce an action on a $5,000 note against you I would be compelled to go into the State court.

Mr. PADWAY. Yes.

Senator NORRIS. And that is giving to you, because you come from Wisconsin, a privilege which we do not give to our own citizens.

Mr. PADWAY. Yes.

Senator NORRIS. And no one claims, who has had any experience, that the State court would not give you just as fair a trial as in a Federal court.

Mr. PADWAY. Yes. I agree with you. I do not think that there is any necessity longer to provide against State lines in judicial matters; there is no necessity on account of prejudice for citizens of one State to go into the Federal court when suing citizens of another State instead of going into the State courts. With that I must agree with you.

Now, it occurs to me, about this bill, which we have here—may I put a question to you, Mr. Chairman, since you have introduced this subject?

If your position is correct, and I have come to the turn of mind where I agree with your argument as to the law, but can not a law be passed, if you can limit the jurisdiction of Federal courts, which will limit jurisdiction in matters affecting labor disputes to the States? I know that there are those who say that that is class legislation, if Congress attempted to make it apply in labor matters only. Is that class legislation? I am not so sure that it is, and I am not so sure that if Congress can limit jurisdiction that it can not also say that the jurisdiction shall vest exclusively in the State courts with respect to labor disputes.

Senator NORRIS. Even if it could, for the sake of the question, there would be a very serious objection to saying that a court can have Federal jurisdiction over other cases, but can not have it over this kind of a case.

Mr. PADWAY. Yes, sir.

Senator NORRIS. The law, it seems to me, to be fair with everyone, ought to be general in its terms, so that a question of class legislation could not arise. If we limited the jurisdiction of the district courts of the United States we ought to have it apply, I should think, to everything.

Mr. PADWAY. Well, a labor dispute is a matter that can be taken into the State courts very easily. It affects a situation that is generally within the confines of the State border. It is brought into the Federal courts simply because of diversity of citizenship, or because of property belonging to citizens of another State. Now, I do not think that by inference that could be construed as an attack upon the fairness of our Federal courts, nor do I think that that would be subject to the attack that it is class legislation. I can not see why the dispute should not be settled right in the State courts of the State where the dispute arises, where the men, where the employees and the employers are, where the plant is located.

The State court could handle the matter and you could remove that question or that jurisdiction entirely from the Federal court. I will say this frankly: I am not saying that by the way of an indictment of the Federal courts at all, but labor does not feel kindly toward Federal courts. The statement I am making now, asking that these cases be removed from the Federal courts, or that they be taken out of the Federal courts, or that the Federal courts be deprived of jurisdiction in this matter, is based upon the sad experience labor has had with the Federal courts. We make the request upon that basis alone. Labor will tell you that in this economic trouble between labor and those who employ it, they have not been dealt with as fairly as have those who have employed labor. And, if you will look at the report of Basil M. Manley, on the Commission of Industrial Relationships, and his conclusions, and he goes into the case thoroughly, you will no doubt agree with me. Are you familiar with that report? I suppose you are. He goes into the cases and codifies the decisions affecting matters where the rights of labor are involved and where those who employ labor are involved, and shows by analogy or by comparison that the courts have—I would not say consciously, but there will be

those who will say even consciously, because of their experience—shown a decided prejudice against labor. The prejudice results from the individual social and economic views of the judge.

Take the very recent decision in the Bedford Stone Cutters' case. There Justice Brandies in a dissenting opinion went as far as to say that the particular view he held, must be held by those who believe in the principle of organized labor. That was also the idea that was expressed in the Lockwood case, the Lockwood Bakery case. Justice Holmes in a dissenting opinion in the Supreme Court decision went so far as to say that the Supreme Court was entering into a debating society, as to whether such and such measures were necessary. Of course, the question of health entered into that and the majority said that the health measure in question was reasonable: a minority held otherwise. There were three justices, I think, that dissented as the minority. I think that there were three justices that dissented from the majority, and wrote separate dissenting opinions. Justice Holmes statement as the fourth dissenter, in his dissenting opinion said that if it were a question as to whether he were to agree or to disagree with the policies of that particular economic or social question, that he would want to study it long before he would make up his mind, but that he did not conceive that to be his duty; that that was for the legislature to determine; that the law could only be tested by the plain provisions of the Constitution. Therefore, illustrating that eight judges arrived at conclusions purely based on their personal economic views.

We have those situations right along, that the economic view enter into the decision of the judge; labor charges that the judges more frequently are more familiar with the conditions from the employers' standpoint and are inclined to favor his interests.

Labor says that with some force, and I think, with some justification. There is a great deal that can be shown in support of statement of theirs.

Now, this bill in question here, I can not say in the short time that I have had it, less than a day, that I can be of any help to this committee. I would want to know what is in the mind of the framer, to be able to properly discuss it. I am not opposed to it. But it occurs to me it does not go far enough. For instance, it says:

> Equity courts shall have jurisdiction to protect property when there is no remedy at law.

I am quite fearful, as a labor lawyer, that the court will not hesitate to read into that, to insert between the two words "no remedy" the word "adequate" so that it would read, "no adequate remedy at law," although I suppose the framer of the bill intended that the word "adequate" should not be in there. It is quite specific when it says, "Equity courts shall have jurisdiction to protect property when there is no remedy at law," yet we have found in our experience, cases where "unreasonable" and "reasonable" have been written into the law by decisions, where the law does not intend that, and where they do not belong. So I am afraid the courts will read in the word "adequate." And then, of course, by writing in the word "adequate" we will have the same situation as we have had in the long list of cases referred to as emasculating the Clayton Act, making us subject to the judicial whim and attitude of the court.

Then we have "For the purpose of such jurisdiction nothing shall be held to be property unless it is tangible and transferrable."

I suppose that means only what is concrete property; but I am not certain, Mr. Chairman, that that meets the situation, for this reason: The injunctions, and particularly temporay injunctions, are generally the result of previous ex-parte orders.

At present they are not issued only to cover tangible and transferable property, but the proposition of potential irreparable damage. Now, what is there to prevent those who present these bills in equity to a court, setting up allegations that there will be irreparable injury to tangible and transferable property? If that is inserted in the allegations, will not the courts assume the jurisdiction to issue those injunctions in the same manner as they do now? Have we progressed far enough? Is there much benefit to be derived from this section if the allegations in the bill and in the affidavits that are generally submitted as the basis for the injunctions state that there is liable to be irreparable injury to tangible and transferable property, if the court will upon such showing issue an injunction?

I do not know what was in the mind of the framer. I would like to have heard the proponents of the measure give their reasons as to how they intend to overcome that situation. Yet the bill may take care of it. It may be a step in the right direction. It may declare a policy. It may have a tendency to lessen injunctions and perhaps bring about a different judicial attitude. I do not know. But it occurs to me—and I am stating this frankly, although I am for any bill that will alleviate the situation as it exists at present—that from labor's point the bill doesn't go far enough. The words "for the purpose of determining said jurisdiction, nothing shall be held to be property unless it is tangible and transferable" require more thought by me than I have been able to give to them.

As I view it and stated simply and in a few words, I think that language means this: That the court can issue an injunction only to protect tangible and transferable property. That is about what it means that the courts can issue an injunction to protect tangible and transferable property. But the courts will hold, I fear, under this language that interference with the use and enjoyment of such property is the subject of protection by injunction. If the present allegations do not meet the situation it will simply mean that instead of the present allegations that are made in a bill of complaint there will be made another allegation, and it will be to the effect that injunction should issue, because it is quite likely that there will be some irreparable injury to the plant; that such injury is the result of an unlawful conspiracy, entitling the employer to restrain everything in furtherance thereof. Why, all that will need to be done to meet that situation will be to get some private detective to throw a brick through a window of the plant and smash that window, and there will be the basis for the allegation of the destruction of property; and there is your basis for an injunction, and I can not see how this proposed measure prohibits issuance of an injunction. I quite believe it is not a very great advantage unless those responsible can see more to the bill than I can.

I should have liked to have heard the proponents of the measure, Senator Shipstead and others, but I suppose that all of that is in

this compilation here in these prints, Part I and Part II, which I shall read. But in reading over this bill, it occurred to me that this is not going to curb the injunction evil, speaking now in labor terms, and I can not see that it will have the desired results, or will be of great advantage, because it still gives the Federal courts equity jurisdiction when tangible and transferable property is involved or may be involved. But I am by no means opposed to the bill. It may do more than I am aware of.

Just one matter in conclusion. It would be a pity if this committee were to conclude the matter without doing something. The cry for relief is based upon a great deal of misery. The injunction evil is certainly responsible for a great deal of industrial unrest. No doubt this committee is well informed and feels that something ought to be done. The work must be extended. It must run into a future period of time. Some bill or measure, whether this or another, should be passed to take care of the situation so that labor will be placed upon a more equal footing in these controversies.

Now, I suppose that you may come back at me and say, "What can you offer, Mr. Padway?" I confess at this time that I have not much to offer. I was not present at the conferences which brought this bill into being, but I shall give it some thought.

Of course, I have my suggestion, I would deny Federal courts any jurisdiction to issue in junctions in labor disputes. This I have to offer; and if there is to be a bill passed allowing injunctions, there should be a limitation that no ex parte order shall be issued before a lapse of 48 hours after notice served on the other side. This law was passed in Wisconsin while Senator Blaine was governor.

Perhaps I should put down this conclusion in this form, in order that it may be read by the other members of the committee: It is my opinion, as general counsel for the Wisconsin State Federation of Labor, American Federation of Labor, and my experience in labor matters, that the Federal courts should be deprived of the jurisdiction to issue injunctions in labor disputes, that the matter should be left to the State courts; tha a limitation as to time should be included in any measure, if one is to be passed giving the courts injunction jurisdiction, to the effect that before issuance of ex parte orders at least 48 hours' notice shall be served upon the side sought to be enjoined, within which time that side may appear and show cause why an order should not be issued, or if it is to be issued, the terms that it shall contain.

I thank the committee for the courtesy and the time that they have allowed me.

(Thereupon, at 11.45 o'clock a. m., the hearing was adjourned to 10.30 o'clock a. m., Thursday, March 15, 1928.)

LIMITING SCOPE OF INJUNCTIONS IN LABOR DISPUTES

THURSDAY, MARCH 15, 1928

UNITED STATES SENATE.
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to adjournment, at 10.30 o'clock a. m., in the committee room, Capitol, Senator George W. Norris, presiding.

Present: Senator Norris (chairman).

STATEMENT OF WILLIAM A. GLASGOW, COUNSEL FOR THE UNITED MINE WORKERS OF AMERICA

Mr. GLASGOW. I have been asked, if your honor please, to present to your committee the situation which has been left in the coal-producing territory of West Virginia, and incidentally in other districts, by reason of 12 injunction cases which were decided by the district courts, and on appeal to the circuit court of appeals, the order of the district court was affirmed, and upon application to the Supreme Court certiorari was denied, leaving the situation as it exists under the order of the district judge.

Of course, your honor, in discussing this matter, I shall have to refer to the decisions of the courts, and I expect to do so with perfect courtesy but also with frankness.

The situation as it is left in my judgment is one in which in the great controversies that occur in the coal districts as between labor and the employer is left in such confusion that nobody knows what the law is. That confusion is brought about by the various constructions that have been put upon the Sherman Act and the Clayton Act. It has been brought about by the assumption that Congress, under its power, constitutional power, to regulate commerce between the States and with foreign nations had by the Sherman law undertaken to police the districts of West Virginia where these cases occurred, and I say that advisedly, and undertaken by the intervention of an injunction decree and the execution of it by the marshals, and the threat of contempt to regulate the question of lawlessness, or violation of law in disputes which may locally take place as between a labor union and the employer on the question of the wage scale or the recognition of the union.

The first suggestion I have to make, or excuse for being here, is that I think it can be demonstrated that the law as it exists under the decisions of the courts to-day is in such confusion that no competent lawyer can advise a client as to what are the relative rights under the decisions, the laws, and the Constitution of the United

States to-day, and that the Sherman law has been extended to a point that was never contemplated in the vainest dream of anybody that had anything to do with it.

Now, I am justified in coming to this committee of Congress to present that situation because the courts have put the burden of that situation on Congress. They do not do it under the general powers of courts of equity of recognized jurisdiction, but they say, "We are required to do this by the command of Congress," and I believe it can be demonstrated that Congress never had in contemplation the extent to which the provisions of the Sherman Act have now been extended.

Of course, we all know in a general way what brought about the Sherman Act but the Steel Company Trust, and the Tobacco Trust, and the Standard Oil Trust, and the Power Trust, they all remain to-day doing business at the same old stand, and there is nothing left for them but to take hold of labor and use the processes of the court under the Sherman Act to secure peace and quiet in the community.

Now, sir, there is no use discussing what has taken place down there in West Virginia. I think the record in those cases, some 5,000 pages, demonstrated that there was just as decisive a condition of lawlessness on one side as on the other, in local disputes where they disregarded all law and order, both sides.

It is not necessary for me to tell you either, because you know it, that the records in West Virginia of disputes proves law officers of the State in the pay of the employer perpetrated outrages and made the subject of political dispute in campaigns of great earnestness and excitement, is a condition that can not be justified in morals or on any other ground, but it does not justify the courts of the United States in saying that we must take hold of this under the Sherman Antitrust Act and have the labor of that whole community, and that large part of the country under the terror of contempt proceedings.

If your honor please, the simple question, to which I will refer hereafter, of what they call these contracts of labor, has brought about a condition and an injunction against persuasion to join the union, has brought about a condition that, if it is upheld, if it is approved—the honest way would be to say that we will have no labor unions, the honest way—the other is a hypocritical excuse to destroy the organization under the cloak or disguise of carrying out the provisions of the Sherman Act.

That situation, if your honor please, is one that I shall call your honor's attention to a little later on. I will have to go back and just briefly bring out the situation to when these injunction bills were filed.

In 1898 was the first extensive scale of union wages established throughout what was then called the competitive district, the central competitive field of Indiana, Illinois, and the western part of Pennsylvania.

It was brought about by the conditions that existed prior thereto of demoralization in the coal country, even almost approaching what it is to-day, and finally the operators and the miners got together and established the union scale of wages throughout that territory. They continued renewing contracts from time to time and finally in 1903, the first time the union entered the State of West Virginia, and

the union scale was adopted in the Kanawha field at a conference held in the city of Huntington at that time.

Now, if you honor please, in passing, I just want to say that the union scale in West Virginia has always been less than the union scale in the competitive fields of Ohio, Indiana, and Illinois. It may be well for me to state how that scale is made. I do not know how it originated unless it did in the method of the railway rates where the basic rate is established from Chicago to New York and all the intervening territory is upon a differential under or above it, but the operators and the miners of what was known as the central competitive field, adopted from time to time what they called the basic scale of wages. It might be the Hocking Valley district, and then they dissolved and each district went back and the miners and the operators in that district met and fought out what should be the district scale as compared with the basic scale, either a differential under or a differen[illegible] has continued all the time except that the d[illegible] Virginia increased from 1903 until the [illegible]its, [illegible] Virginia was more favorable to [illegible] ever bee[illegible].

Now, th[illegible] u[illegible]e Kana[illegible] and a number of other dist[illegible] West Vi[illegible] who[illegible] re[illegible], as they call it, the unio[illegible] was in e[illegible]rato[illegible]cted with the union e[illegible] for the mining [illegible] in thos[illegible]s, but south of the Ka[illegible], the[illegible] was t[illegible] district and the Wi[illegible] district, and the[illegible]ar and the [illegible]hontas, where there was what we call a non-union district, where the scale did not exist.

That [illegible]ong, if y[illegible]e, to [illegible] the war, and from tim[illegible]e they [illegible] scale and [illegible]ued it. From time to ti[illegible]e we[illegible]ich were[illegible] and they continued this [illegible]act [illegible]way [illegible]til the war came and the fue[illegible]ed. Gar[illegible]was [illegible]d Fuel Administrator and h[illegible]d the miner[illegible]ors to make a new contract, which[illegible]ment supervision and which the President[illegible]into.

That was known as [illegible]ge scale and it was to continue for the period of the war or for two years, or for the period of the war.

After the armistice in 1919 when it was felt that the war was over, the miners demanded a new scale of wages. It was declined. The strike occurred then of 1919. The Government intervened and filed a bill in Chicago to enjoin the officers from calling a strike on the ground that the war was not over. This was in 1919. That was settled between the Attorney General and the president of the United Mine Workers in which the strike order was recalled and provided for the appointment of a coal commission to determine what should be the scale of wages as between the operators and the miners.

That commission composed of an operator, a miner, and a third person made its report in March of 1920, known as the bituminous coal commission's report. The President summoned the miners and the operators and directed them to enter into a contract, the basis of which was the report of this commission, and this was entered into for all the fields and they went back to work. That contract provided that it should extend until the 31st of March, 1922, and that

prior to its expiration they should meet for the purpose of working out another wage scale. That went along and subsequently a strike was called over in the Williamson field, a nonunion field in the effort to extend the union its membership in that territory, and the strike occurred in 1920.

Now, in 1921 with the contract in force between the operators of the Kanawha and the New River district, and the miners, the operators came to the conclusion that they could make more money on a nonunion basis than they could on the union basis, and they repudiated their contract and undertook to run on a nonunion basis. Then, when the 31st of March came, application was made to them to work out a new scale of wages and they declined to meet their employers on any basis whatsoever and the strike of April, 1922, occurred by reason of there being no contract whatever, and immediately after that strike immediately after the first of April, these 12 injunction bills, 11 of them were filed, one having been filed when the strike occurred in 1920 in the Williamson field.

The strike was settled in August of 1921 and it was settled by reaffirming and extending the contract which had been made under the direction of the President in respect to the report of the bituminous coal commission. That contract was reaffirmed and extended in its operation until finally the Jacksonville agreement was made and that agreement is an extension of the contract which the President directed to be made as a result of the report of the bituminous coal commission. That is the Jacksonville contract that is so much talked about.

Now, when these bills were filed, immediately after the strike, the charge was that the operators of the central competitive field and the miners had in 1898 entered into a conspiracy in violation of the Sherman Act for the purpose of destroying the West Virginia coal operators and their production of coal. It also charged that the miners' union was in and of itself in violation of the Sherman Act. It charged that the check-off system was in violation of the Sherman Act. It charged that the strike of 1922, which had been brought about by their failure to make any contract at all, was in violation of the Sherman Antitrust Act and, therefore, subject to the jurisdiction of the United States court.

Now, if your honor please, it is not necessary for me to go into the entire details of the evidence, nor into the findings of the district court nor into the facts that were presented to it. All it is necessary for me to do is to show your honor what the decision of the circuit court of appeals was, because the Supreme Court declined to review the decision of that court on certiorari.

The circuit court of appeals brushed away the charge of conspiracy under the 1898 contract. It was so evidently absurd. The evidence was there of the men who participated in that conference, as to what took place and its purpose and the fact that every contract between the operators and the miners since the year 1917 had been supervised, directed, and required by the United States Government, and they were living under those contracts all the time. They wiped that away. The court also wiped out of consideration the charge that the miners' union was in and of itself a violation of the Sherman Act.

The court also wiped out of consideration the question of the violation of the Sherman Act by reason of the check off, but the court

states that they had combined themselves, the union had combined themselves, the union members, to prevent the produtcion and shipment of coal. In the evidence and in the opinions you will find no charge made in the bills or evidence introduced of any interference whatever with the transportation of coal, or with the sale of it in other States. The only interference with the shipment was the interference with the production by reason of the strike, and if there was no production there could be no shipment, which the Supreme Court says is a mere indirect interference and has no bearing. The circuit court of appeals puts it squarely on the ground that the miners themselves, in their strike of 1920 and in their strike or 1922, had interfered with the production and shipment of coal by the non-union operators in West Virginia in order to force the acquisition of the West Virginia miners and to make effective the strike declared pursuant to the policy of the union, and then the court specified:

> There can be no question that the strikes called by the union in the non-union fields of West Virginia in 1920 and 1922, and the campaign of violence and intimidation incident, were merely the carrying out of the plan and policy upon which the defendants had been engaged for a number of years.

Senator NORRIS. Let me ask you, Judge, suppose the court in that case had found that there was not any conspiracy to interfere with the shipment of coal in interstate commerce. In other words, that the court had held that the simple fact that there could not be any shipment of coal where none was produced, and they had only gone far enough to strike, and that the interstate question was only incident to it; would that have taken the jurisdiction of the court away? Was it necessary for the court, in other words, to hold as you say it did, in order to retain jurisdiction?

Mr. GLASGOW. I maintain, as I will try to demonstrate to your honor, that the rule of the Supreme Court is that the interference with production, and, incidentally, if there is no production there can not be any coal shipped, is not sufficient to give jurisdiction under the Sherman Act, but that there must be a further interference either with the transportation of coal or with the marketing of it in other States.

Senator NORRIS. Then, if this finding of the district court there that was sustained on appeal had not been on that point, just as it was, the court would have lost jurisdiction. It would not have had any right to issue the injunction.

Mr. GLASGOW. None at all.

Senator NORRIS. The right to issue the injunction was based on the fact that in that case then that this strike interfered with the production of coal and it incidentally interfered with the shipment of coal in interstate commerce.

Mr. GLASGOW. That is the point I am trying to make. The court squarely puts it on that ground that the miners themselves when they struck, and when they struck against having no contract, when they declined to work because they could get no contract, that thereby they stopped the production of coal, and thereby stopped the incidental shipment of coal, therefore they were brought themselves within the Sherman Antitrust Act. That is what this court held.

Now, sir, if that is the law, and there has been no certiorari to review it, if that is the law, they have pitched into the scrap heap decisions of the Supreme Court to such an extent that no lawyer

to-day can tell you anything about what is the protection under the Sherman Antitrust Act, and when I say, "pitched into the scrap heap" I mean it respectfully but earnestly. Your honor has got my point that the basis of the jurisdiction in these 12 cases as announced by the circuit court of appeals was the interference by the miners themselves with the production of coal and its consequent shipment by reason of the strike of 1920 and the strike of 1922.

Mark you, I repeat this thing, because it is important, there was not a scintilla of evidence, there was no charge in the bills of any interference either with the transportation of coal or with its sale in the markets of other States.

Now, if your Honor please, I want to be as brief as I can. I want to just call attention to some of the decisions.

The first case I want to call your attention to is the case in the Supreme Court of the United Mine Workers *v.* Coronado Co., (259 U. S.), and I see my old friend over there who will check me up on any error I may make as to this because we fought it out.

In that case, exactly the same charge was made as to the contract, as to the conspiracy of 1898, which was made in this case. In fact the bills in this case were based on the charges of that case, which was in Arkansas, that a conspiracy had been entered into between the miners and the operators and by the miners themselves to destroy the plant of this Coronado Coal Co. It was an outrageous thing they did, induced, as the Supreme Court says, by the ——— I have forgotten the word the Supreme Court used, which created so much interest at the time, but anyhow by the unfair action of the operator this was brought on himself and his plant was destroyed, and outrages were perpetrated and men killed, and it was a terrible situation.

Then they brought a suit against the United Mine Workers on the ground that they were engaged in a conspiracy in violation of the Sherman Act and they must have treble damages. They got a verdict of $300,000, which was trebled, which was $900,000 and which the Supreme Court set aside.

Here is what the court said on this question which I am now presenting of interfering with production and shipment:

> Coal mining is no interstate commerce, and the power of Congress does not extend to its regulation as such. In Hammer *v.* Dagenhard (247 U. S. 251, 272), we said: "The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce, make their production a part thereof. (Delaware, Lackawanna & Western R. R. Co. *v.* Yurkonis, 238 U. S. 439.) Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce." * * * It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restraint, or burden it, it has the power to subject them to national supervision and restraint.

But Congress has not done it.

Senator NORRIS. Just read that again, Judge. I lost a little of it.

Mr. GLASGOW. Yes, sir. [Reading:]

> It is clear from these cases that if Congress deems certain recurring practices, though not really part of interstate commerce, likely to obstruct, restrain, or burden it, it has the power to subject them to national supervision and restraint.
>
> Again, it has the power to punish conspiracies in which such practices are part of the plan, to hinder, restrain or monopolize interstate commerce. But

in the latter case, the intent to injure, obstruct, or restrain interstate commerce must appear as an obvious consequence of what is to be done, or be shown by direct evidence or other circumstances.

Senator NORRIS. I judge by that, the court held Congress would have the power if it wanted——

Mr. GLASGOW (interposing). Yes; but that it had not and the Sherman Act was in force and the Clayton Act, just as much as it is to-day.

Then the court goes on and says:

What really is shown by the evidence in the case at bar drawn from discussions and resolutions of conventions and conference, is the stimulation of union leaders to press their unionization of nonunion mines.

That is exactly what they were doing in 1920 when the strike occurred. [Reading:]

* * * not only as a direct means of bettering the conditions and wages of their workers, but also as a means of lessening interstate competition for union operators which in turn would lessen the pressure of those operators for reduction of the union scale of their resistance to an increase. The latter is a secondary or ancillary motive whose actuating force in a given case necessarily is dependent on the particular circumstances to which it is sought to make it applicable.

Now, here is one sentence that I can not understand the meaning of:

If unlawful means had here been used by the national body to unionize mines whose product was important, actually or potentially, in affecting prices in interstate commerce, the evidence in question would clearly tend to show that that body was guilty of an actionable conspiracy under the antitrust act.

In other words, if the mining of coal is in commerce. If the strike in order to unionize the mine is not an interference with commerce how can that be changed into interstate commerce by an act of violence? Your honor may be able to answer that question sometime but it will require a considerable amount of ingenuity and thought, but the point I make is in response to the basis put by the circuit court of appeals, interfering with production and shipment, that the court says in this case that that is not an interference with interstate commerce and Congress has not by the Sherman Antitrust Act made it unlawful under the Sherman Antitrust Act.

That was followed by the United Leather Workers case (265 U. S.), and that was the case of the manufacturers of trunks at St. Louis where there was a strike. There was the same charge there that there was an interference with interstate commerce because the trunks had been largely sold in other States and had to be shipped there. Here is what the court says in the sole question:

The sole question here is whether a strike against manufacturers by their employees, intended by the strikers to prevent, through illegal picketing and intimidation, continued manufacture, and having such effect, was a conspiracy to restrain interstate commerce under the antitrust act because such products when made were, to the knowledge of the strikers, to be shipped in interstate commerce to fill orders given and accepted by would-be purchasers in other States, in the absence of evidence that the strikers interfered or attempted to interfere with the free transport and delivery of the products when manufactured from the factories to their destination in other States, or with their sale in those States.

To paraphrase it, the question here presented is whether an interference with the production of coal by the strike of the United Mine Workers, when the strikers knew that that coal when mined was to be shipped out of the State into interstate commerce, were they guilty of

a violation of the Sherman Antitrust Act when it did not interfere with transportation or the sales in other States, and the court answered that question by saying:

> We think that this question has already been answered in the negative by this court. (In United Mine Workers *v.* Coronado Co., 259 U. S. 344.)

Now, if your honor please, we thought that the Supreme Court had been cleared up to some extent what was obscure before. We thought that after the Coronado case and the reversal of that case in that court, followed by the Leather Workers' case, that, in order to justify the invoking of the United State court's protection under the Sherman Act, you must show, not an interference with production or subsequent shipment, but must show an interference with transportation or with sales in other States.

Now, the court further said:

> This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacture to monopolize the supply, control its price, or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce.
>
> The record is entirely without evidence or circumstances to show that the defendants in their conspiracy to deprive the complainants of their workers, were thus directing their scheme against interstate commerce. It is true that they were, in this labor controversy, hoping that the loss of business in selling goods would furnish a motive to the complainants to yield to demands in respect to the terms of employment; but they did nothing which in any way directly interfered with the interstate transportation or sales of the complainants' product.
>
> We concur with the dissenting judge in the circuit court of appeals when, in speaking of the conclusion of the majority, he said: "The natural, logical, and inevitable result will be that every strike in any industry or even in any single factory will be within the Sherman Act and subject to Federal jurisdiction, provided any appreciable amount of its product enters into interstate commerce.

Now, sir, the burden is put for the decree in this case upon Congress. The court says, "We have got to do this, because Congress has directed it by the Sherman Act."

We say that that calls for legislation and expression of its opinion by Congress either that they did not intend this by the Sherman Act and that the law governing the regulation of commerce under the Constitution must be put back to where it rightfully belongs. Now, how did the circuit court of appeals come to make that decision? They based that construction, and said there were two cases directly in point. One was the Brims case, which was decided in 1926.

In the case of United States *v.* Brims, there was an indictment and it charged defendants with combining or conspiring to prevent manufacturing plants located outside of the city of Chicago and in other States than Illinois from selling and delivering their building materail in and shipping the same to said city of Chicago. The proof, however, disclosed merely an agreement between defendants whereby union defendants were not to work upon nonunion-made millwork. The agreement which defendants entered into merely dealt with millwork which was the product of nonunion labor. It mattered not where the millwork was produced, whether in or outside of Illinois, if it bore the union label. The restriction was not against the ship-

ment of millwork into Illinois. It was against nonunion-made millwork produced in or out of Illinois.

In that case the district court dismissed the indictment, was affirmed by the circuit court of appeals, and the case went to the Supreme Court.

The court says:

> They considered no other objection to the judgment of conviction, and the cause came here by certiorari because that point seemed to require further examination. We think it was wrongly decided.
>
> The challenged combination and agreement related to the manufacture and installation in the city of Chicago of building material commonly known as millwork, which includes window and door fittings, sash, baseboard, molding, cornices, etc. The respondents were manufacturers of millwork in Chicago, building contractors who purchase and cause such work to be installed, and representatives of the carpenters' union whose members are employed by both manufacturers and contractors.
>
> It appears that the respondent manufacturers found their business seriously impeded by the competition of material made by nonunion mills located outside of Illinois—mostly in Wisconsin and the South—which sold their product in the Chicago market cheaper than local manufacturers who employed union labor could afford to do. Their operations were thus abridged and they did not employ so many carpenters as otherwise they could have done.
>
> They wished to eliminate the competition of Wisconsin and other nonunion mills which were paying lower wages and consequently could undersell them. Obviously, it would tend to bring about the desired result if a general combination could be secured under which the manufacturers and contractors would employ only union carpenters with the understanding that the latter would refuse to install nonunion-made millwork. And we think there is evidence reasonably tending to show that such a combination was brought about, and that, as intended by all the parties, the so-called outside competition was cut down and thereby interstate commerce directly and materially impeded. The local manufacturers, relieved from the competition that came through interstate commerce, increased their output and profits; they gave special discounts to local contractors; more union carpenters secured employment in Chicago and their wages were increased. These were the incentives which brought about the combination. The nonunion mills outside of the city found their Chicago market greatly circumscribed or destroyed; the price of building was increased; and, as usual under such circumstances, the public paid excessive prices.

If your honor please, is it not perfectly clear that the combination there was to destroy the market in Chicago for goods that were shipped from Wisconsin? It is an entirely different proposition, one that merely reaffirms the old Duplex case or secondary boycott, and the Hatters case, where the conspiracy was to prevent a citizen of Wisconsin selling his goods in Chicago in the markets where he had been accustomed to selling.

Does not that case fit in with the Leather Workers case? Is this not the counterpart, the other side? The Leather Workers case says a combination to stop production can not be in restraint of interstate commerce unless it interferes with transportation or sales. Here is a case that the direct attack was made upon the market where the interstate commerce was to be sold and the circuit court of appeals used that case as the authority upon which——

Senator NORRIS (interposing). It seems clear to me that there is a very clear distinction between those two cases.

Mr. GLASGOW. There certainly is.

Senator NORRIS. The committee is confronted with this proposition. Suppose that is true, nevertheless, it is clear to the committee that there is such a distinction and that this case you have last cited,

the strike in Chicago, against the products of the mills from Wisconsin, was a case where, under the law they were justified in issuing the injunction if they found the conspiracy existed and that that is not a controlling feature in these other cases you have been talking about. Suppose we assume that the committee reaches that conclusion, what are we going to do about it? Here are the courts, in the issuing of these injunctions, who have not seen the distinction as we see it, and they hold the other way. What can we do?

Mr. GLASGOW. My first proposition is, you have got to do something, because they are laying it on you.

Senator NORRIS. Yes.

Mr. GLASGOW. That is my first proposition and the second proposition is that even if they have got the authority to enjoin the interference with the sales and transportation, which was the subject of considerable dispute in the Supreme Court, if they have that authority, it does not justify going further and destroying an institution which has been approved over and over by the courts.

Senator NORRIS. I will admit it, but we have got to legislate so that the courts will not do that anymore. How are we going to do it?

Mr. GLASGOW. If Congress wants to do what is the unequivocal, honest, straight answer to the proposition, my judgment is that they ought not to undertake to apply the Sherman Act in any cases of labor strikes.

Senator NORRIS. If we did that we would make the injunction in this Chicago case illegal.

Mr. GLASGOW. Undoubtedly.

Senator NORRIS. But, suppose now Congress does not want to go that far. There is going to be some contention. I am thinking of what will happen when we get into the Senate with this. How are we going to differentiate by statute?

Mr. GLASGOW. You can do it just as the court did where the effect was to interfere with transportation or with the markets where interstate commerce——

Senator NORRIS (interposing). I am going to ask you a question, just one that occurs to me. It just occurs to me in passing. I am thinking of the time—how are we going to frame a law that will meet the contingency, if we find one exists, and how would we frame a law, if we wanted to say by statute—we do not want to make it impossible for a court to issue an injunction as they did in the Chicago case, because we believe that was an interference with interstate commerce. We do not believe however, that the court was right when it said, these circuit courts and district courts, when it said, that the simple mining of coal should be stopped and an injunction should issue that would prevent the simple mining of coal simply because incidentally it might interfere with interstate commerce. Could we reach that point if we inhibited the injunction and then by a proviso, or some other means, say that it was not the intention of Congress to prevent the issuing of an injunction in a secondary boycott?

Mr. GLASGOW. Now, Senator, just let me give you my reflex to your suggestion.

Senator NORRIS. That is what I want.

Mr. GLASGOW. My reflex is this. The courts have done that. If you take the leather workers case and lay it alongside the Brims case you will find that the courts have said you can not issue an in-

junction unless there is interference with transportation or with the sales in the market, and the Brims case says that where there is an interference with sales in an interstate market you can. Well, now, if the court can do that, can not Congress do it? They have written the law. It took a good many pages to do it. I think it could be boiled down. They have undertaken to make that distinction and I would say under the decision that is the law to-day and if it is it can be written, transcribed.

Now, when I said just now not to make the Sherman Law applicable to controversies or labor-union strikes, I did it with this qualification. I have no objection, if your committee thinks it is necessary, where the interference is with transportation or with the market, or a secondary boycott, of declaring that illegal under the Sherman Act, but unless you can do that by legislation, which I believe can be done, courts have done it, unless you can do that, I would not permit that to stand in the way of protecting the labor organization that was in the exercise of its legitimate right to protect itself by strike against production. I am no extremist on these subjects, sir.

Senator NORRIS. Suppose the committee believed that. We are confronted with the proposition that if we do anything that amounts to anything we have got to get our law through both Houses of Congress.

Mr. GLASGOW. That is true.

Senator NORRIS. So that, regardless of what my independent opinion might be, I might find that it would be impossible to get that to go where I wanted it to go, or the committee wanted it to go.

Mr. GLASGOW. I know the difficulty, and so often an act comes out which, when necessity requires it, like the Clayton Act, and the court just knocks the stuffing out of it. That is what I mean by making an unequivocal statement. It is hard to get both Houses to do it.

Senator NORRIS. There is a clear distinction between the cases that are known as the secondary boycott cases and the other cases.

Mr. GLASGOW. Yes, sir.

Senator NORRIS. And there are a great many people who would oppose the injunction in the ordinary case who would favor it in a secondary boycott. That is another step.

Mr. GLASGOW. Yes; that is another step.

Senator NORRIS. And it can be compared, I think, pretty well to what the Supreme Court has said in referring to interference with interstate commerce. That is another step here. Of course, every-one of these things will interfere with interstate commerce; but it is incidental, we will say.

Mr. GLASGOW. Yes.

Senator NORRIS. We have got to let that go because it is incidental. Now, on the other hand, a great many people who want a remedy think there ought to be one. When you get to a secondary boycott you have taken another step there that is a very serious one and we think the injunction ought to be permitted in a secondary boycott and not in the other cases. Now, we may be confronted with the proposition of framing that kind of a law.

Mr. GLASGOW. The suggestion I make to your honor is that if you take these two decisions, while it is not in the form of an act, that the court has made, that distinction in these two cases, one says it is

legal and the other says it is illegal. Now, if you refer to those two, you will get the point.

Now, in order to not take too much time, the Stone Cutters' case was the other one referred to by the circuit court of appeals——

Senator NORRIS (interposing). It was a secondary boycott.

Mr. GLASGOW. Exactly, and now you have my point on the question of whether the whole five districts of West Virginia, and it is spreading and has spread all around, whether they should live in their organization, which has been recognized by the courts, recognized by the Clayton Act, whether they should live in terrorum of injunctions of the United States courts in veiw of the law and its present condition.

Now, there is one other point I want to refer to and that is what the court did down there. I am perfectly frank to say, I have to be, that the district court injunction, except in one respect, if the court had jurisdiction, I do not think you could make any reasonable objection to it if the court had jurisdiction, except in one important particular.

I want to call your honor's attention to the Tri-City Council case where Mr. Justice Taft undertook to define what were the proper relations between labor and employer. It is in 257 U. S., I read at page 208:

> Is interference of a labor organization by persuasion and appeal to induce a strike against low wages, under such circumstances without lawful excuse and malicious? We think not. Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the point product of labor and capital. To render this combination at all effective, employees must make their combination extent beyond one stop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda, without more, to be without excuse and malicious.

Now, what did the operators in those five districts undertake to do? They got up contracts, they are sometimes called ugly names, and properly, by which an employee coming to work there, down in a nonunion mine, comes up to the captain's office and is required to sign a paper, and that paper agrees that he is not a member of the United Mine Workers of America, the I. W. W., or any other organization of mine workers, and that he will not, during his employment, join or affiliate with any such mine-labor organization; that if he does he will immediately quit the employment of the company, and

then make that fellow, just from Poland or Hungary, who signs his mark, make this observation, "The preservation of the right of individual contract free from interference or regulation by others and payment in proportion to services rendered is to my interest, to the best interest of the public, and of all industry," his mark following.

Batches of them are brought in with that kind of contract. Now, the circuit court of appeals in Indiana held that persuading that fellow to quit his employment and join a union was exactly in accordance with the contract, because he said he would quit the employment as soon as he joined.

The circuit court of appeals in West Virginia, and it is spread over Pennsylvania, Ohio, and elsewhere, holds that by that contract the miners all over that territory are insulated, and you can persuade them to join the union. That was sustained by the circuit court of appeals. The Supreme Court declined to grant a certiorari, and we have the Chief Justice saying: "That the right to invite people by proper peaceful propaganda to become members of the union is a right that is guaranteed to the members of this organization," and the court says:

"As it is in West Virginia to-day, in the first districts where these injunctions prevail in futuro, forever," so it says that the men employed there, some of whom were taken away, a great many of them taken away from their membership in the United Mine Workers by the persuasion of the operator, they are insulated from the persuasion of their own brethren to join their craft in order to maintain the wages at a living basis for themselves and their families.

Now, if your honor please, something was said about persuasion in the Clayton Act, but the construction of that act by the courts has made it absolutely worthless, and this disingenuous method of evading the right and insulating the laborer and preventing him from hearing what is the reason that he should become a member of this organization, in view of the Supreme Court, puts the people of the United States in the most absolute condition of hypocracy, holding out the right to persuade and cutting it off by a contract of this kind.

It is almost like, if your honor please, "Mother may I go out to swim? Yes my darling daughter; hang your clothes on a hickory limb, but don't go near the water." You have a right to persuade them to join the union, but if they have agreed that they will quit that employ as soon as they do, then you have no right to persuade them to join the union. That is an easy matter to meet by legislation, and I submit to your honor that the failure of the Supreme Court to review these cases was a shock to counsel in connection with them. I do not know why, because I thought we met every requirement that the rule made for review, conflict in evidence between two circuit courts of appeals, and so on, but the court saw proper to leave it in the condition that the circuit court of appeals left it. If your honor please, it is intolerable. We might as well speak frankly. You hear these men claiming, "Oh, we believe in organized labor," as they put it, "as long as it is like a Wednesday evening prayer meeting, yes," but when it is really effective, no. If the view of the United States is, and this Congress, that the matter shall be handled this way, it is much better to prohibit absolutely any organization of labor than to

go about it in a hypocritical and indirect way to destroy this organization.

That organization, if your honor please, has been guilty of a good many things that I do not approve, and their officers do not approve of to-day; but if you take it all in all, it has accomplished a great deal of good to anybody who has lived long enough to see the development in the condition of labor in the coal fields as compared with what it used to be. No man who is in that organization will condone the things that occurred—like the Arkansas trouble—or things of that kind. On the other side, you can point your finger in West Virginia to as outrageous acts of murder and lawlessness of all kinds by hired thugs and deputy sheriffs as you can point to on the other side. That ought not to weigh on the question of determining what the law of the land shall be. It ought not to determine the question of Congress, in an indirect way, permitting this organization to be destroyed because I do not know what is the result. I have as much interest in this country as most people. I do not claim for myself any more. I have been a citizen of it for nearly 63 years and I have just as much interest in it as anybody, and I do not want to see any condition brought about which is prejudicial either to the development or the rights of anybody. At the same time I believe that the abolition of the labor union or its destruction, especially the coal end of it, that no man can see the end of the chaoes which would prevail. The worst strikes ever seen were in nonunion fields, bitterness, danger, murder, and everything; but as an honest man I have come to the conclusion that if you are going to kill them, kill them straight out. Do not go to work by indirection, holding out to them their privileges and rights, and then denying them to them.

I have nothing more to say, and I thank your honor for listening to me so kindly.

STATEMENT OF T. C. TOWNSEND

Mr. TOWNSEND. Mr. Chairman and gentlemen of the committee, You have under consideration the Shipstead bill. In connection with the consideration of this bill there is involved, incidentally if not directly, the subject of injunctions in so far as they relate to labor disputes. In approaching the subject I do so from the standpoint of one who has observed from time to time the curious working of injunctions granted in labor disputes involving the United Mine Workers of America. I would respectively direct the committee's attention to three propositions: First, court decisions; second, the unusial terms of a few of the numerous injunctions granted; and third, suggested remedies.

COURT DECISIONS

The first outstanding case involving the United Mine Workers of America was that of Hitchman Coal & Coke Co. *v.* Mitchell (245 U. S. 229, 62 L. ed. 268). Jurisdiction in this case was invoked on the grounds of diversity of citizenship. It arose in the northern district of West Virginia. The original restraining order was granted May 26, 1908. It finally reached the Supreme Court of the

United States March 13, 1916. This was the first case decided by the Supreme Court of the United States in which was involved what is commonly known as the "yellow dog" contract. In this case it was shown that the nonunion employees of the plaintiff company were working under verbal contracts of employment which provided that while such employees were employed by the plaintiff company they would not become members of the United Mine Workers of America or any other labor organization. The evidence in the case discloses that the United Mine Workers organization, through their representatives and agents, undertook to organize the employees of plaintiff's mines, their plan of procedure being to have such employees secretely join the union and continue in the employment of the plaintiff. The court held, in effect, that the methods employed in persuading the men to join the union and continue in the employment of the company were unlawful and malicious, but modified the order entered by the district court. The second paragraph of the order as modified by the Supreme Court of the United States reads as follows:

> * * * from interfering or attempting to interfere with the plaintiff's employees for the purpose of unionizing the mine without the plaintiff's consent, and in aid of such purpose knowingly and willfully bringing about the breaking by plaintiff's employees of contracts of service known at the time to exist with plaintiff's present and future employees.

Stated in another way the court held that defendants were acting maliciously when they persuaded the employees of plaintiff, in violation of their contracts of employment, to join the union and continue in the employment of plaintiff.

Following this case in chronological order is the case of American Steel Foundries *v.* Tri-City Central Trades Council (257 U. S. 184, 66 L. ed. 189). The original bill of complaint in this case was filed in May, 1914, in the District Court for the Southern District of Illinois. Jurisdiction in this case was likewise invoked on the ground of diversity of citizenship. Between the time the bill was filed in this case and its final decision by the Supreme Court of the United States, Congress passed the Clayton Act. This was the first case reaching the Supreme Court of the United States in which the Clayton Act was construed. The court, among other things, held:

> Is interference of labor organizations by persuasion and appeal to induce a strike against low wages, under such circumstances, without lawful excuse and malicious? We think not. Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employee refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment.
>
> Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order, by this convenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has, in many years, not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must have their combination extend beyond one shop. It is

helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they were bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership, and especially among those whose labor at lower wages will injure their whole guild. It is impossible to hold such persuasion and propaganda, without more, to be without excuse and malicious. The principle of the unlawfulness of maliciously enticing laborers still remains, and action may be maintained therefore in proper cases; but to make it applicable to local labor unions in such a case as this seems to us to be unreasonable.

Counsel representing the plaintiff in this case relied upon two cases in the Supreme Court of the United States to sustain their contention, Hitchman Coal & Coke Co. *v.* Mitchell, supra, and Duplex Printing Press Co. v. Deering 254 U. S. 443, 65 L. ed. 349). In distinguishing this case from the Hitchman case, the court said, with reference to the methods used by the defendants in the Hitchman case:

The plan thus projected was carried out in the case of the complainant company by the use of deception and misrepresentations with its nonunion employees, by seeking to induce such employees to become members of the union, contrary to the express terms of their contract of employment that they would not remain in complainant's employe if union men, and, after enough such employees had been secretly secured, suddenly to declare a strike against complainant and to leave it in a helpless condition, in which it would have to consent to be unionized. This court held that the purpose was not lawful, and that the means were not lawful, and that the defendants were thus engaged in an unlawful conspiracy which should be enjoined. The unlawful and deceitful means used were quite enough to sustain the decision of the court, without more. The statement of the purpose of the plan is sufficient to show the remoteness of the benefit ultimately to be derived by the members of the International Union from its success, and the formidable country-wide and dangerous character of the control of interstate commerce sought. The circumstances of the case make it no authority for the contention here.

And further, in distinguishing this case from the Duplex case, said:

The Hitchman case was cited in the Duplex case, but there is nothing in the ratio decidendi of either which limits our conclusion here, or which requires us to hold that the members of a local labor union and the union itself do not have sufficient interest in the wages paid to the employees of any employer in the community to justify their use of lawful and peaceable persuasion to induce those employees to refuse to accept such reduced wages and to quit their employment. For this reason, we think that the restraint from persuasion included within the injunction of the district court was improper, and in that regard the decree must also be modified. In this we agree with the circuit court of appeals.

After the decision in the Foundries case counsel representing the United Mine Workers of America felt safe in advising their clients that they had the right to recruit the membership of their union from the nonunion employees of coal companies in the mining regions of the United States by peaceable persuasion even though they were working under contracts of employment so long as they acted in the open without malice, deceit, or fraud. This was likewise the interpretation placed upon the case by the Circuit Court of Appeals of the Seventh Circuit in the case of Gasaway *v.* Borderland Coal Corporation (278 Fed. 56), wherein the court said:

Appellee sought and obtained a decree restraining "the unionization or attempted unionization of the nonunion mines" in the Williamson district. Appellants, and their agents and representatives in West Virginia, are thus enjoined from publishing lawful union arguments and making lawful union speeches to those in the pool of unemployed labor to join the union rather than

the nonunion ranks; and from using lawful persuasion to induce any one of appellee's employees to join the union and thereupon instantly and openly to sever his relationship with appellee, not in violation of, but in exact accordance with, his contract with appellee.

Next in order came the first case of United Mine Workers of America *v.* Coronado Coal Co. (259 U. S. 344, 66 L. ed. 975). This was a law case involving damages under the Sherman Act. The Supreme Court in this case held:

Coal mining is not interstate commerce, and the power of Congress does not extend to its regulation as such. In Hammer *v.* Dagenhart (247 U. S. 251, 272, 62 L. ed. 1101, 1106; A. L. R. 649, 38 Sup. Ct. Rep. 328, Ann Cas. 1918E, 724), we said: "The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce make their production a part thereof." (Delaware, L. & W. R. Co. *v.* Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902.) Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce.

The next case in order is United Leather Workers, etc., *v.* Herbert and Meisel Trunk Co. (265 U. S. 457, 68 L. ed. 1104). The bill in this case charged defendants, United Leather Workers Union, Local Lodge No. 66, with a conspiracy in restraint of interstate commerce under the Sherman antitrust law and the Clayton Act, and that such conspiracy had been carried on by mass picketing, intimidation, coercion, etc.; that the effect of the union's conduct was to prevent plaintiffs from continuing to manufacture their goods needed to fill orders they had received from customers in other States; that 90 per cent of the output of their plants was shipped in interstate commerce. The court said:

The sole question here is whether a strike against manufacturers by their employees, intended by the strikers to prevent, through illegal picketing and intimidation, continued manufacture, and having such effect, was a conspiracy to restrain interstate commerce under the antitrust act because such products, when made, were, to the knowledge of the strikers, to be shipped in interstate commerce to fill orders given and accepted by would-be purchasers in other States, in the absence of evidence that the strikers interfered or attempted to interfere with the free transport and delivery of the products, when manufactured, from the factories to their destination in other States, or with their sale in those States.

We think that this question has already been answered in the negative by this court. In United Mine Workers *v.* Coronado Coal Co. (259 U. S. 344, 66 L. ed. 975, 27 A. L. R. 762, 42 Sup. Ct. Rep. 570), a coal mining company in Arkansas changed its arrangement with its employees from a closed shop to an open shop. The local union resented the change and the avowed purpose of the company to protect nonunion employees by armed guards. Violence, murder, and arson were resorted to by the union. Seventy-five per cent of the output of the mine was to be shipped out of the State, and a car of coal prepared for interstate shipment was destroyed by the mob of strikers and their sympathizers. It was contended that, as the result of the conspiracy was to reduce the interstate shipment of coal from the mines by 5,000 tons or more a week, this conspiracy was directed against interstate commerce, and tripple damages for the injury inflicted could be recovered under the Federal antitrust law. But this court held otherwise, and reversed judgment for a large amount on the ground that the evidence did not disclose a conspiracy against interstate commerce, justifying recovery under the law. The language of the court was (p. 407):

Coal mining is not interstate commerce, and the power does not extend to its regulation as such. In Hammon *v.* Dagenhart (247 U. S. 251, 272, 62 L. ed. 1101, 1105, 3 A. L. R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918 E. 724) we said: "The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in inter-

state commerce make their production a part thereof. (Delaware, L. & W. R. Co. *v.* Yurkonis, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902.) Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce." The same rule was followed in Gable *v.* Vonnegut Machinery Co. (274 Fed. 66, 73, 74).

The same general principles are affirmed in Heisler *v.* Thomas Colliery Co. (260 U. S. 245, 259, 67 L. ed. 237, 243, 43 Sup. Ct. Rep. 83; Crescent Oil Co. *v.* Mississippi, 257 U. S. 129, 136, 66 L. ed. 166, 42 Sup. Ct. Rep. 42; Arkadelphia Mill Co. *v.* St. Louis Southwestern R. Co., 249 U. S. 134, 151, 63 L. ed. 517, 527, P. U. R. 1919C, 710, 39 Sup. Ct. Rep. 237; McCluskey *v.* Marysville & N. R. Co., 243 U. S. 36, 38, 61 L. ed. 578, 579, 37 Sup. Ct. Rep. 374; Diamond Glue Co. *v.* United States Glue Co., 187 U. S. 611, 616, 47 L. ed. 328, 332, 23 Sup. Ct. Rep. 206; Capital City Dairy Co. *v.* Ohio, 183 U. S. 238, 245, 46 L. ed. 171, 175, 22 Sup. Ct. Rep. 120; United States *v.* E. C. Knight Co., 156 U. S. 1, 20, 21, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Coe *v.* Errol, 116 U. S. 517, 528, 29 L. ed. 715, 719, 6 Sup. Ct. Rep. 475).

After the decision of the Supreme Court of the United States in these two cases, counsel representing the United Mine Workers of America felt safe in advising their clients that a strike of the coal miners in certain sections of the United States which stopped the production of coal and which did not interfere directly with the transportation, sale, or use of coal in interstate commerce was not in violation of the Sherman Act or the Clayton Act, and that the Federal courts were without jurisdiction to entertain applications for restraining orders upon the theory that the United Mine Workers' organization was engaged in a conspiracy to interfere with interstate commerce.

Next in order came the second case of Coronado Coal Co. *v.* United Mine Workers of America (268 U. S. 295, 69 L. ed. 963), in which the court held:

The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortuous prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the antitrust act. (United Mine Workers *v.* Coronada Coal Co., 259 U. S. 344, 408, 409, 66 L. ed. 975, 994, 995, 27 A. L. R. 762, 42 Sup. Ct. Rep. 570; United Leather Workers' International Union *v.* Herkert & M. Trunk Co., 265 U. S. 457, 471, 68 L. ed. 1104, 1109, 33 A. L. R. 566, 44 Sup. Ct. Rep. 623; Industrial Asso. *v.* United States, 268 U. S. 64, ante, 849, 45 Sup. Ct. Rep. 403, decided April 13, 1925.) We think there was substantial evidence at the second trial in this case tending to show that the purpose of the destruction of the mines was to stop the production of nonunion coal and prevent its shipment to markets of other States than Arkansas, where it would by competition tend to reduce the price of the commodity and affect injuriously the maintenance of wages for union labor in competing mines, and that the direction of the district court to return a verdict for the defendants other than the international union was erroneous.

While this case was on its way to the Supreme Court of the United States the consolidated cases of Red Jacket Consolidated Coal & Coke Co. *v.* John L. Lewis, et al., involving more than 300 separate and distinct coal companies, 40,000 coal miners, and an annual production of 40,000,000 tons of coal was instituted in the District Court of the United States for the southern district of West Virginia. These consolidated cases were finally decided by the circuit court of appeals April 18, 1927, and the Supreme Court of the United States at its October term, 1927, refused to review the cases by certiorari.

These consolidated cases, commonly known as the "Red Jacket cases," were sustained by the circuit court of appeals upon authority of the second Coronado case, supra. In this case the court held:

> It is said, however, that the effect of the decree, which, of course, operates indefinitely in futuro, is to restrain defendants from attempting to extend their membership among the employees of complainants who are under contract to join the union while remaining in complainant's service, and to forbid the publishing and circulating of lawful arguments and the making of lawful and proper speeches advocating such union membership. They say that the effect of the decree, therefore, is that, because of complainants' employees have agreed to work on the nonunion basis, defendants are forbidden, for an indefinite time in the future, to lay before them any lawful and proper argument in favor of union membership.
>
> If we understood the decree we would not hesitate to modify it. As we said in the Bittner case, there can be no doubt of the right of defendants to use all lawful propaganda to increase their membership. On the other hand, however, this right must be exercised with one regard to the rights of complainants. To make a speech or to circulate an argument under ordinary circumstances dwelling upon the advantages of union membership, is one thing. To approach a company's employees, working under a contract not to join the union while remaining in the company's service, and induce them in violation of their contracts to join the union and go on a strike for the purpose of forcing the company to recognize the union or of impairing its power of production, is another and very different thing.

These cases taken together seem to establish as a settled law of the land that the employer of labor in the fields of the United States under the "yellow-dog" contract has acquired a property right in the status of his employee. Under the Hitchman case the organization is restrained from persuading employees who are under contract to join the union and remain in the employment of the company. In the Red Jacket case the organization is restrained from persuading employees under contract to quit their employment and join the union. The result of it is that labor in the mining regions where the "yellow-dog" contract is employed (that contract has now become coextensive with the nonunion bituminous coal fields of the United States) is completely insulated.

May I not venture to say therefore with propriety, in the language of Judge Brandeis, found in his dissenting opinion in the case of Bedford Cut Stone Co. *v.* Journeymen Stone Cutters Association of North America, et al. (47 Sup. Ct. Rep. 523), that the combined use of the "yellow-dog" contract and the injunction has created a status for labor in the nonunion coal fields that "reminds of involuntary servitude."

TYPICAL INJUNCTIONS GRANTED IN SOUTHERN WEST VIRGINIA, OHIO, AND PENNSYLVANIA

I desire to call the committee's attention to a few of the many injunctions which have been granted involving the United Mine Workers of America and then ask the judgment of the committee as to whether or not we have made a case for legislative relief. The district courts seem to proceed upon the theory that their power is unlimited to control the activities of the mine workers' union. On the 8th day of April, 1922, in one of the consolidated cases involved in the Red Jacket Consolidated Coal & Coke Co. *v.* John L. Lewis, et al., the District Court of the Southern District of West Virginia

issued a restraining order, found at page 320 of the first volume of the record, the fourth paragraph of which reads as follows:

That C. F. Keeney, president of district 17, United Mine Workers of America; Fred Mooney, secretary-treasurer of said district; C. H. Workman, executive board member of said district; Lawrence Dwyer, international executive board member of said United Mine Workers of America; Scott Reece, executive board member of said district 17; B. A. Scott, international board member of said United Mine Workers of America; Andy Porter, vice president of subdistrict No. 2 of district No. 17, of said union; R. P. Toney, secretary of said subdistrict; Daniel Ware, executive board member of said district 17; Eb. Oakes, president of subdistrict No. 1, of said district 17; James Corbett, secretary of said subdistrict No. 1, of said district 17; and Nick Aiell, president of subdistrict No. 3, of said district 17, members of the United Mine Workers of America, and all its officers, members, agents, and representatives be restrained and enjoined from taking any further steps, and from doing any further act or thing to unionize the mines of the plaintiffs by means of persuasion, threats, menaces, intimidation, force, or violence, or by the use of money given or paid to their employees, or given or paid to the members of said organization, or to any other person or persons whomsoever to be used by them to persuade, intimidate, or coerce plaintiffs' employees to break their contracts of employment, or to prevent any person seeking employment to be employed by the plaintiffs, or either of them, as they may desire, or in any manner whatsoever, and from in any way or manner interfering with the said contracts of employment between the said plaintiffs and their employees, and from in any manner interfering with the lawful right of the plaintiffs to employ such laborers as they may choose, and to discharge them when they see fit, either with or without cause."

The sixth paragraph of this order, in part, provides as follows:

* * * all the members, agents, and representatives of the United Mine Workers' organization, be and they are hereby, enjoined and restrained from and after the period of 30 days from further maintaining the tent colonies of Mingo County or in the vicinity of the mines of the plaintiffs, and they, the said last-named defendants, are hereby enjoined and restrained from further furnishing to the inhabitants of said tent colonies or to those who may hereafter inhabit the same, any sum or sums of money, orders for money, merchandise, or orders for merchandise or any other thing of value so as to make possible the continuance of said tent colonies in said Williamson-Thacker coal field in the vicinity of the mines of the plaintiffs, the court finding that the presence of such tent colonies in the vicinity of said mines is a continuing source of menace, threats, intimidation and danger to the persons of the plaintiffs' employees and to the plaintiffs' property and business in interstate trade and commerce.

The court in its finding of facts, at page 325 of the record, held in the sixth paragraph thereof, as follows:

That the presence and continuance of the tent colonies mentioned in the bill of complaint and evidence, in the vicinity of the mines of the plaintiffs is a continuing source of menace, threats, intimidation and danger, to the persons of the plaintiffs' employees, and the plaintiffs' properties and business of interstate trade and commerce.

These provisions were stricken out of the order by the circuit court of appeals, but they are typical of the extent to which the district courts are inclined to go in their effort to control the activities of the union.

The form of the final order in the Red Jacket case is set out in full in the court's opinion, and is as follows:

(1) From interfering with the employees of the plaintiffs or with men seeking employment at their mines, by menaces, threats, violence, or injury to them, their persons, families or property, or abusing them or their families, or by doing them violence in any way or manner whatsoever, or by doing any other act or things that will interfere with the right of such employees and those

seeking employment, to work upon such terms as to them seem proper, unmolested, and from in any manner injuring or destroying the properties of the plaintiffs, or either of them, or from counseling or advising that these plaintiffs should in any way or manner be injured in the conduct and management of their business and in the enjoyment of their property and property rights.

(2) From trespassing upon the properties of the plaintiffs, or either of them, or by themselves, or in cooperation with others, from inciting, inducting or persuading the employees of the plaintiffs to break their contract of employment with the plaintiffs.

(3) From aiding or assisting any other person or persons to commit, or attempt to commit any of the acts herein enjoined.

(4) From aiding or abetting any person or persons to occupy or hold without right, any house or houses or other property of the plaintiff, or any of them, by sending money, other assistance to be used by such persons in furtherance of such unlawful occupancy or holding.

In the District Court of the United States for the Southern District of Ohio, Eastern Division, in the case of Clarkson Mining Co. *v.* United Mines Workers of America, which case is now pending, paragraph 13 of the order is as follows:

13. The marshal for the southern district of Ohio is directed to see that this injunction is enforced within the limits of said district, and to arrest and cause to be arrested any person or persons caught in the act of disobeying any of the provisions of this injunction, and to bring such person or persons forthwith before the United States commissioner or the court, and to report to the court each such other acts of disobedience of this order as may otherwise come to his attention. The marshal is authorized and directed to call to his assistance such persons, either as deputy marshals or otherwise, with compensation allowed by law, as he may deem necessary and is empowered by law to do, for the purpose of securing early and prompt obedience to the provisions hereof within his jurisdiction, and for that purpose the marshal, with such assistants as he shall deem necessary to so appoint, shall attend the premises of plaintiffs and intervenor within his jurisdiction, from time to time, and especially at such times as plaintiffs or intervenor shall be ready to engage in mining operations in said respective mines; and said marshal is authorized to make service of copies of this order upon any and all persons within his jurisdiction who may be in or about said mines, or in the vicinity thereof, whether or not named as defendants herein.

In the District Court of the United States for the Western District of Pennsylvania, in the case of Pittsburgh Terminal Coal Co. *v.* United Mine Workers of America, paragraph 8 of the order is as follows:

(8) From disbursing any funds for any further appeal bonds, attorney services, court costs, or otherwise for the purpose of enabling, aiding, encouraging, or procuring any person to occupy against the plaintiff's will any such mining houses of plaintiff; from signing any further appeal bond or depositing, providing, or furnishing security for such appeal bond to prolong or aid in litigation respecting the possession of said houses; but nothing herein shall prevent Oliver K. Eaton and William H. Coleman, or either of them, representing as attorneys and counsel the individual occupants of miners' houses in the appeals in the Superior Court of Pennsylvania.

There was not a scintilla of evidence in this case to the effect that the United Mine Workers of America had interfered directly with the sale, transportation, or use of a single pound of coal shipped in interstate commerce. Judge Schoonmaker issued the injunction in this case upon the authority of Red Jacket Consolidated Coal & Coke Co. *v.* John L. Lewis, et al (18 Fed. Rep (2d) 839), and the second Coronado case, supra, using this language:

* * * The Circuit Court of Appeals of the Fourth Circuit, having before them facts similar to the facts recited in the bill of complaint in this case, held that the United States courts clearly had jurisdiction to restrain the inter-

ference of the United Mine Workers of America with the operation of coal mines; and held further that the interference with the production of the mines in question, as contemplated by the United Mine Workers of America, would necessarily interfere with interstate commerce in coal to a substantial degree. There the production of the coal involved was about the same as that involved in the Pittsburgh district, about 40,000,000 tons a year.

In the District Court of the United States for the Northern District of West Virginia, in the case of West Virginia-Pittsburgh Coal Co. *v.* Van A. Bittner, et al., paragraph 7 of the order is as follows:

7. From picketing the streets, roads, or other avenues of approach to plaintiff's mines for the purpose of enticing, entreating, persuading, or by any means inducing plaintiff's employees to break their contracts of service known to them at the time to exist; from approaching plaintiff's employees, present or future, at their place of residence, or at any other place for the purpose of enticing, entreating, persuading, or by any means inducing employees to break their contracts of service known to them at the time to exist; from advertising meetings or by any means inducing plaintiff's employees to attend meetings at which attempts shall be made, by entreaty, enticement, or persuasion, to induce plaintiff's employees to break their contracts of service then known to them to exist; and from doing the like for the purpose of unionizing plaintiff's mines.

The original injunction in this case was issued September 29, 1913. A petition was filed thereunder in April, 1925 praying for an attachment against Van A. Bittner, one of the defendants, charging him with contempt of this order. Van A. Bittner was arrested and taken to Wheeling, W. Va., for trial and was kept there 20 days before a final hearing was had upon the allegations of the petition. The charge against Bittner as set out in the petition was as follows:

The union will win, must win. Since of 1st of April our membership has increased 6,000, and in a short time all nonunion mines in northern West Virginia will be operated under our association, and all nonunion operators will be glad to sign up. You know what we have done this week and next week we are going to do more.

Referring to Messrs. Schwab and Jamison, interested in the Jamison coal mines, he said:

I helped give them a trimming in Pennsylvania. I came in here to help united mine workers give them a lesson in northern West Virginia, and show them that they can not run open shop mines after abrogating their contracts. So far as the United Mine Workers of America leaving the State of northern West Virginia, I will say that the only time they will leave here is when union contract and every mine worker carrying a union card. The United Mine Workers of America are here to stay and are not going to be run out by nonunion coal operators or by the Fairmont Times. I am in northern West Virginia to-day and here to stay until we have every nonunion coal mine working under union contract and all nonunion miners carrying the United Mine Workers of America card.

The above statement of Van A. Bittner which it was alleged was in contempt with the order issued in 1913 was made 125 miles away from the mines of the West Virginia-Pittsburgh Coal Co., in a different coal field and in connection with circumstances and conditions that had no relationship whatever to the West Virginia-Pittsburgh Coal Co.

In the District Court of the United States for the Southern District of Ohio, Eastern Division, in the case of Clarkson Mining Co. et al. *v.* United Mine Workers of America, the court entered an order evicting 55 miners from their houses at mine No. 1 of the Clarkson Coal Mining Co., 53 miners from the houses of the Atlantic Contracting Co. (Florence mine), and 6 miners from the houses of the Monroe

Coal Co. (Webb mine), thus setting aside the laws of the State of Ohio relating to landlord and tenant.

The judge of the court of common pleas of the county of Indiana, in the State of Pennsylvania, in 1925 and again in 1927 issued the most remarkable restraining orders found in the history of jurisprudence in so far as they relate to labor disputes. These injunctions are to the following effect:

1925 INJUNCTION

In the case of Jefferson & Indiana Coal Co. *v.* Charles Aikens et al., Judge J. N. Langham presiding, a portion of the order is as follows:

(*b*) From marching, parading, or picketing in, upon, or through the public roads, rights of way, roads, streets, alleys, bridges, railroads, and other places past and in the vicinity or in the neighborhood or leading to the Lucerne mines.

(*c*) From loitering about at or near or in the vicinity of the Lucerne mines and from loitering, assembling, or congregating in any place or places where the employees of the plaintiff find it necessary to go.

(*d*) From interfering with, intimidating, threatening, assaulting, suggesting danger to or giving the appearance of danger, or influencing or persuading any person to quit, cease, or refrain from working for the plaintiff. * * *

(*e*) From in any way interfering with or hindering plaintiff, its agents, or employees in the conduct, management, or operation of its mines or works.

(*f*) From posting or circulating notices or bills advising or warning men to stay away from Lucerne mines, from inserting or causing to be inserted advertisements in any or all newspapers advising or warning men to stay away from Lucerne mines, from erecting or causing to be erected or maintaining billboards for the purpose of displaying advice or warning to men to stay away from Lucerne mines.

(*g*) From doing any acts, uttering any words, or publishing any paper, sign, or bills whatsoever in the furtherance of any combination or conspiracy or other unlawful acts for the purpose of preventing plaintiff from operating its mines.

1927 INJUNCTION

In the case of Clearfield Bituminous Coal Corporation *v.* A. J. Phillips et al. Judge J. N. Langham of the court of common pleas of Indiana County, Pa., on September 12, 1927, issued an injunction against the said miners' organization, which reads in part as follows:

(*b*) From picketing and parading in, upon, or through the public roads, roads, streets, alleys, bridges, railroads, and other places, past, near, or in the vicinity or in the neighborhood or leading to the Rossiter mines or the dwelling or boarding houses of the employees of the plaintiff.

(*c*) From loitering, assembling, or congregating about or near the property of the plaintiff, or trespassing thereon, from visiting the dwellings or boarding houses of the employees of the plaintiff, to intimidate them or their families, from obstructing the streets or roads of Rossiter, from congregating about or near in the town of Rossiter where the employees and their families go, from operating and maintaining automobile patrols on the streets and roads of Rossiter, from erecting or causing to be erected or maintaining billboards for purpose of displaying signs warning men to stay away from Rossiter, from congregating on the Magyar Presbyterian Church lot, or any other lot, lots, place, or places at the time the employees of the plaintiff enter the mine and at the time the employees of the plaintiff come out of the mine, from singing song or songs in hearing of the employees of the plaintiff of a threatening or hostile nature.

(*d*) From suggesting danger to or giving the appearance of danger to the employees or the families of the employees of the plaintiff; from saying or doing anything to cause the men now working to quit or cause men seeking

work to refrain from so doing; from interfering with or obstructing men from going to or returning from work * * *.

What degree of personal liberty could the defendants exercise under these orders? They are restrained from marching or parading on the public highways, from establishing pickets, from making speeches to nonunion miners, or singing hymns. The union is restrained from contributing to the union strikers. In fact, under these injunctions the strikers can not peaceably assemble, peaceably persuade, advertise their cause in the newspapers, upon billboards, signboards, or otherwise. The mouths of the defendants are as effectively closed as if they were instantly paralyzed. No written or spoken word can be uttered in behalf of the union to which they belong and of the cause which they espouse.

Judge Hough of the southern district of Ohio recognizes the right of the coal miners to use the word "scab" in relation to the nonunion miner. Other judges deny this right. Judge Hough also, in what has been termed his "order of occupation" relating to the coal fields in eastern Ohio, restrains the members of the union from persuading nonunion miners to join the union until their contracts of employment expire. Judge Schoonmaker, for the western district of Pennsylvania, recognizes the right of the union miners to persuade the nonunion miners to terminate their contracts of employment and join the union. Judge Schoonmaker likewise refused to insert in the order issued in the case of Pittsburgh Terminal Coal Co. *v.* United Mine Workers of America the provision found in Judge Hough's order now in effect in the eastern district of Ohio vesting authority in the marshal to enforce the order.

Judge Schoonmaker decided there was no authority for such a paragraph in the order. Judge Hough decided there was. The scope of the injunction order in each particular case seems to depend upon the peculiar whim of the judge who issues it. In some instances conduct on the part of those enjoined which would constitute contempt in Judge Hough's court is recognized as entirely legal by Judge Schoonmaker, and vice versa. A strange doctrine is found in these various orders. In southern West Virginia a mandatory order is issued compelling the removal of the tent colonies. In Judge Anderson's court, of Indiana, an order is issued against the check-off. In Judge Hough's court an order is issued evicting miners from their homes. In Judge Schoonmaker's court an order is issued preventing attorneys representing the union from appearing in eviction cases and also preventing the bonding company from furnishing bond at the instance of the union to union miners threatened with eviction in order that they might appeal their cases in the State courts. Just what is the law relating to injunctions? No one particular judge seems to agree with another.

In the State courts of West Virginia numerous injunctions are issued without notice to the defendants, many of them in the night time. It is to be borne in mind that all these injunctions are the law governing the conduct of those affected thereby. It is little wonder therefore that Judge Brandeis in his dissenting opinion in Truax *v.* Corrigan (257 U. S. 365, 66 L. ed. 279) used this language:

> It was asserted that, in these proceedings, an alleged danger to property, always incidental and at times insignificant, was often laid hold of to enable the penalties of the criminal law to be enforced expeditiously without that

protection to the liberty of the individual which the Bill of Rights was designed to afford; that through such proceedings a single judge often usurped the functions not only of the jury, but of the police department; that, in prescribing the conditions under which strikes were permissable and how they might be carried out, he usurped also the powers of the legislature; and that, incidentally, he abridged the constitutional rights of individuals to free speech, to a free press, and to peaceful assembly.

It was urged that the real motive in seeking the injunction was not ordinarily to prevent property from being injured, nor to protect the owner in its use, but to endow property with active, militant power which would make it dominant over men. In other words, that, under the guise of protecting property rights, the employer was seeking sovereign power. And many disinterested men, solicitous only for the public welfare, believed that the law of property was not appropriate for dealing with the forces beneath social unrest; that in this vast struggle it was unwise to throw the power of the State on one side or the other, according to the principles deduced from that law; that the problem of the control and conduct of industry demanded a solution of its own; and that, pending the ascertainment of new principles to govern industry, it was wiser for the State not to interfere in industrial struggles by the issuance of an injunction.

Laws enacted by Congress or the legislatures of the States are first introduced, then referred to a committee where the public has the right to be heard, usually read on three separate and distinct days in each branch of the legislature, passed by a "yea" and "nay" vote of each branch of the legislature, and then presented to the chief executive for approval. Laws governing people's conduct promulgated through the injunction are put into effect frequently without notice to those affected and are more sweeping in their provisions than the most drastic laws passed by Congress or the legislatures of the States. Citizens of the United States have respect for their Government, Federal and State. Every citizen has inherited the belief, however, that if he commits crime he is entitled to a trial by jury, and he loses respect for his Government if his liberty is taken from him in any other way.

Another suggestion: These injunctions are perpetual. The usual language of the court is "perpetually enjoined" or "forever enjoined." If Congress or the legislature passes a law, a future Congress or a future legislature may repeal or modify it. How can an injunction once issued, probably without notice, if made perpetual, be modified, changed, or dissolved? A rule of conduct may be established governing 40,000 people, as in the Red Jacket case, which is beyond the reach of the court, legislature, or any other branch of the Government. The injunction in the case of West Virginia-Pittsburgh Coal Co. *v.* United Mine Workers of American was issued September 29, 1913. Van A. Bittner was charged with contempt and an attachment issued for him under this injunction in 1925, 12 years after the order was first issued, upon the same theory, I take it, that an attachment order could be issued against Van A. Bittner, or any other defendant named in said cause, in 1950. Judge Parker in his opinion in the Red Jacket case holds that these decrees operate "indefinitely in futuro."

It seems to me a strange doctrine has developed relating to conspiracy in restraint of interstate commerce under the Sherman Act and the Clayton Act. If, as a number of the Federal courts have decided, the United Mine Workers are engaged in an unlawful and criminal conspiracy to restrain the shipment, sale, or use of coal in

interstate commerce, then it would seem to follow that anything done in connection with the conspiracy would be unlawful. If, for example, Judge Shoonmaker and Judge Hough are right in holding that the United Mine Workers of America are engaged in an unlawful and criminal conspiracy in restraint of trade in interstate commerce, how can they be consistent in promulgating an order which permits picketing? If a conspiracy in fact exists, then it is unlawful to picket in connection with the conspiracy. Is it not the position of the courts that they find that an illegal conspiracy exists on the one hand and on the other become a party to that conspiracy by permitting picketing? If, as a result of picketing, a single ton of coal is prevented from being mined and shipped in interstate commerce, that picket, with the permission of the court, has engaged in the conspiracy. The Supreme Court of the United States has held that it is not the extent of the interference with interstate commerce that determines its unlawfulness, but that interference to any extent is unlawful.

In connection with this subject I commend for your consideration the most excellent address of Hon. George Wharton Pepper, delivered at the Academy of Music in Philadelphia, Pa., July 8, 1924, to the Pennsylvania Bar Association and the American Bar Association. A portion of this address is as follows:

> The thing called picketing may, accordingly, be regarded as much more than an effort to persuade or intimidate nonunion workers. It may be conceived of as the protective action of a great social group who feel outraged at what seems to them the betrayal of their class.
>
> In a community which so conceives of it, picketing is not a thing to be stopped by injunction. It is rather a thing to be domesticated along with the strike. Attending at or near the plant or near the nonunion man's house for the purpose of persuading him to abstain from working, becomes a normal and inevitable course of conduct. If you object that such conduct may easily lead to violence, the answer will be made to you that the administration of criminal law must in that event be relied upon for protection. * * *
>
> This means that in England picketing has been recognized as inevitable class self-protection, while with us it is still treated as a preventable offense against the rules of industrial war. * * *
>
> In other words, our British friends have come to recognize peacable picketing as a legitimate concomitant of a strike, but have trained the guns of their criminal procedure upon conduct which threatens breach of the peace or invasion of private right. What they have thus domesticated we still seek to enjoin. * * *
>
> I was led recently to make such a review of our industrial history by my desire to account for the growing bitterness of organized labor toward the Federal courts. In the Senate one quickly becomes aware of the existence throughout the country of a sentiment on this subject which, if unchecked, may easily develop into a revolutionary sentiment. I accordingly addressed a letter to every United States district attorney, asking him to secure from the clerk's office in his district a copy of all such injunction orders made by the United States court in his district during the last few years. Courteous attention to my request has supplied me with a most interesting mass of material. The study of these orders discloses an evolution mildly comparable with the growth of the corporate mortgage. The injunction orders have become more and more comprehensive and far-reaching in their provisions, until they culminate in the shopmen's injunction order already referred to. Every thoughtful lawyer, who has not already done so, should read that order and meditate upon its significance. In so doing he should have in mind that during the shopmen's strike in 1922 nearly every one of the 261 class I railroads and a number of short-line railroads applied for injunctions in the various Federal courts. No applications were denied. In all, nearly 300 were issued.
>
> Naturally enough, during the past two decades, there have been bitter protests from the ranks of labor. To the striker it seems like tyranny to find

such vast power exercised—not by a jury of one's neighbors but by a single official who is not elected, but appointed, and that for life, and whose commission comes from a distant and little-understood source. The protests have taken every conceivable form. They include a suggested act of Congress to take away the jurisdiction to issue injunctions except to protect tangible property, and a proposed amendment to the Constitution framed to make Federal judges elective. Whether the so-called Caraway Act should be regarded as a protest emanating from organized labor, I do not know. It is at any rate a manifestation of the same tendency. * * *

Difficult as is the duty which we have forced upon our Federal judges, their problem has of course been complicated by the necessity of considering what conduct is, and what is not, a direct interference with interstate commerce or a violation of some Federal statute. Less than a month ago the Supreme Court (in United Leather Workers' Union v. Herkert & Meisel Trunk Co.) decided, six justices to three, that picketing to prevent the manufacture of goods which, if manufactured, would have been shipped in interstate commerce was not a conspiracy in restraint of interstate commerce within the antitrust act. Any other decision would have subjected to Federal jurisdiction every strike in every factory the produce of which was destined to swell the volume of interstate commerce. But back of the decision upon this jurisdictional ground looms the vital question—shall we persist in compelling the United States courts to take up the shock of our industrial warfare? * * *

Respect for the courts is not the least valuable part of our English inheritance. Under such a system of government as ours the maintenance of wellnigh universal confidence in the judiciary is pretty nearly essential to national safety. Is it not worth our while to place elsewhere than upon our Federal judges the burden of solving for us our legislative and executive problems?

To maintain such confidence must we not confine the courts to the sphere in which the creators of our constitutional system intended them to live and move and have their being?

REMEDIES

First. Repeal section 16 of the Clayton Act. Then no one could secure an injunction in restraint of trade except the Government of the United States. This was the law until the passage of the Clayton Act. If it was the law now, the injunctions of southern West Virginia, southern Ohio, eastern district, and western Pennsylvania would not exist.

Second. Where jurisdiction of the Federal courts is invoked because of diversity of citizenship, then limit the scope of the injunction to the defendants named in the bill. This is suggested because of the subterfuge practiced in some jurisdictions in securing injunctions because of diversity of citizenship and then enforcing the injunction against residents of the same jurisdiction as the plaintiff. This was true in the Hitchman case and in the case of the West Virginia-Pittsburgh Coal Co. in the northern district of West Virgina.

Third. I indorse the suggestions contained in the memorandum submitted by Mr. Warrum, which, if enacted into law, would eliminate suggested remedies herein contained.

STATEMENT OF CHARLES W. CHESNUTT, MEMBER OF THE OHIO BAR

Mr. CHESNUTT. I am a member of the bar although not very actively engaged in practice.

By your kind permission my friend Mr. Davis and I appear before you to be heard against the Shipstead antiinjunction bill pending in Congress, and now in the hands of your committee, on behalf of colored labor.

The bill is proposed and promoted by the labor unions. Its object is to limit the power of injunction vested in Federal courts, with the view of strengthening the hands of the labor unions in labor disputes.

Now, labor owes a great deal to the unions. Their efforts have done much to promote the dignity of labor and to secure a living wage for working men. They have exercised great power and influence, but whether that power and influence should be increased or not depends upon how they are to be used, and I hope to show you by concrete examples that so far they have been used very slightly for the benefit of negro labor and very often exercised against its interests. And that being so, Mr. Davis and I are down here to argue against the reporting out of this bill.

In a certain sense this committee is sitting as a board of arbitration, or an equity tribunal, so to speak, to decide in advance upon the wisdom, the justice, the lawfulness and, am I permitted to say, the expediency of passing this bill. Expediency I imagine is a large factor in matters political; indeed I have heard it said by some of the grave and reverend seniors who make up your august body that the principal and at times the only qualifications for the nomination or appointment of certain gentlemen to very high office was expediency—but I think you gentlemen will agree that in the long run what is wise and just is most expedient, as some of the gentlemen just referred to have found out to their sorrow.

I make the charge baldly that the labor unions of the United States, broadly speaking, are unfriendly to colored labor, and I challenge them to prove the contrary.

In support of this charge, I quote, first, from one of the Johns Hopkins University studies in historical and political science entitled "Admission to American Trade Unions," being Series XXX, No. 3. It includes, among other things, an elaborate study of discriminations respecting membership made by such union affecting both women and negroes. It is stated on page 119:

> The national trade-unions which practically from the beginning have denied admission to negroes are the locomotive engineers, the locomotive firemen, the window glass workers, the switchmen, the wire weavers, the maintenance-of-way employees, the railroad trainmen, the railway carmen, the railway clerks, the railroad telegraphers, the commercial telegraphers, the boiler makers, and iron shipbuilders, and the machinists. Ordinarily, exclusion is established by the membership qualifications clause of the national organization. For example, the locomotive firemen have provided by constitutional provision since 1884 that only "white born" applicants are eligible. The boiler makers and iron shipbuilders and the machinists accomplish the exclusion by a rule or pledge which forms part of the ritual and binds each member to propose only white workmen for membership.

On page 125:

> Ordinarily, the unimpeded admission of negroes can be had only where the local white unionists are favorable. Consequently, racial antipathy and economic motive may, in any particular community, nullify the policies of the national union. Various instances of local discrimination against negroes have arisen which excluded them from membership (1) by denying them admission to the union of the whites, or (2) by refusing consent to charter a separate negro local union, or (3) by rejecting a negro applicant holding a transfer card.

On page 128:

> (3) Finally, local antagonism may discourage the unionizing of negroes through the refusal of certain local unions to accept the transfer cards of

traveling negro members. It is impossible to measure or to know the extent to which this form of discrimination actually prevails. The national agreement presumably binds each local union to admit the transferred members of all the other local unions, except that in the electrical workers, the bridge and structural iron workers, the bricklayers and masons, the carpenters, the plumbers, the steam fitters, and the steam engineers workmen with traveling cards may be rejected when considered incompetent. Under the guise of a test for competency, negro traveling members may be excluded from those trades. Instances of discrimination have occurred, however, without the pretext of incompetency as a justification of exclusion.

These statements discloses that 12 national unions make negroes ineligible for membership.

The colored people of the country have exercised and still exercise their citizenship under very great handicaps. Their constitutional rights of life, liberty, and property, and that other intangible right mentoned in the Declaration of Independence, but not included in the Constitution except by inference, the pursuit of happiness. have been infringed by legislation and by the common consent of white people to such an extent as in many respects almost to nullify them; to such an extent, indeed, that it is only to the courts that they can look for relief. The court of conscience—I don't mean in the legal sense—often does not seem to have jurisdiction where the negro is concerned.

The Federal courts, in those part of the country where the rights of negroes are most limited, have been almost their only bulwark against oppression and other kinds of discrimination, and the power of injunction has been one of the strongest weapons which those courts have employed. They have declared unconstitutional laws passed by States and municipalities, providing for unjust and discriminatory election laws. The power of injunction has undoubtedly been abused in some cases, but it has been exercised beneficiently in a great many others.

The labor unions not only discriminate against colored men in admission to the unions, but in some unions to which they are admitted they are denied the full benefits of those unions. The locals decide the distribution of labor, but the colored member is usually the last to be supplied with a job, if at all.

In support of these statements I wish to cite the case of C. E. West, contracting electrician of the firm of Thompson & West, Cleveland, Ohio. I think I will read the affidavit of Mr. West. It is an illuminating illustration of the attitude and methods of at least one very important union upon the admission of colored men to membership, and what results from the denial of such membership. And mind you, these events took place, not in the benighted far South, but in the city of Cleveland, and therefore can not be attributed to local race prejudice and can only be explained as the result of a calculated policy, which is indeed admitted.

AFFIDAVIT

STATE OF OHIO,
Cuyahoga County, ss:

I, Charles E. West, being first duly sworn, say that I reside at 3382 East One hundred and thirtieth Street, Cleveland, Ohio; am 34 years old, and am an electrician by trade.

I am a colored man. When I was 16 years old I was office boy for Myron T. Herrick, and later for some of his associates who were interested in the

Cleveland Electric Illuminating Co. While working as office boy I studied electricity and finally became an electrician, at which trade I have worked for the past 17 years.

The electrical work of Cleveland is done almost wholly by union men. In 1914 I applied to become a member of the Electricans Local Union in Cleveland. At that time the initiation fee was between $40 and $50. However, they demanded $100 initiation fee of me and of another colored man—Elmer L. Thompson. I gave the union secretary my check for $200 to cover the initiation fee of Mr. Thompson and myself. The secretary handed it back to me and said I would have to see Mr. Hart. I called repeatedly for the next three months at the union office and was always told that Mr. Hart was out.

I continued to work until 1916 or 1917, in which two years 25 different jobs of wiring which I had done were destroyed by cutting the wires throughout the work. Then I called on Mr. Clarence Sickman, business agent of the same electricians' union, and told him that I could not continue working because of the damage done to my work and asked him if he could see that a union card or permit was given to me by my joining the union. Mr. Sickman said:

"Well, I might just as well tell you now that we will not take colored men in as members of the union. Our charter forbids it."

He asked me to return that evening to the executive committee meeting. The committee met behind closed doors and after waiting some time I noticed them dispersing. I went to them and repeated what I said to Mr. Sickman. There were present at this meeting in addition to Mr. Sickman some eight or nine other members of the committee, all white men. Mr. Sickman said:

"We are willing to let you and your partner, Mr. Thompson, continue to work if you will agree not to teach any more colored men the electrical trade."

I told him that the colored men working with us had studied in colleges outside of Cleveland and were largely men who came from outside of Cleveland, together with some who had graduated from Case School of Applied Science.

After that some more of our jobs were destroyed and I again went to Mr. Sickman, business agent. I told him that some more of our work had been damaged and asked him if he would permit union electricians to work for us so as to satisfy the union. He said he would bring it up before the union, and I returned to him about a week later. Mr. Sickman said:

"Our men won't work for a colored man."

I said, "I know some of the men who will work for us if the officers will let them work."

Mr. Sickman denied this. Then I said, "Now, Mr. Sickman, you won't let the union men work for us and you won't take us into the union. What shall we colored electricians do?"

Mr. Sickman said, "There must be some other work besides electrical work that you can find to do."

I told him that I had given so many years studying electricity that I would not want to give up the trade.

In the following two years contractors reported to me that the business agent of the electricians union had come to them and said:

"If West comes here for work, don't give that nigger any work."

One of these contractors was Mr. Altshuler, who told me that the business agent of the electricians' union had told him that if I did the electricians' work, there would be trouble. Mr. Altshuler then took away from me the electrical work on a nine-suite apartment house which had been previously contracted to me. A little later this same thing occurred with a contractor, Tony Visconsi.

The same occurrences have happened time and again during the past few years. Finally, last year I was working on a contract for Mr. Borish on Sandusky Avenue in Cleveland, when Mr. Fred Babki, the business agent of the electricians' union, appeared on the job. Mr. Babki said:

"You have a nonunion electrician working here."

I said, "You know why I am not a union man. I can't get into the union."

Mr. Babki said, "I have not a thing to tell you, West. I am here looking after the work to see that only union men work."

There was present a Mr. Lukenhouse, a contractor, who was building some houses on the same street and for whom I had work. Mr. Lukenhouse said to Mr. Babki:

"Mr. West has explained to me that you will not take him into the union, and I have no sympathy with the union about Mr. West because he is a good workman."

After working a few days, I had to quit.

Immediately after that I completed the electrical wiring for a Mr. Eglin in Garfield Heights, a suburb of Cleveland. The work was finished and approved by the city inspector, who placed his seal on the work. The day after it was finished there was a meeting on the job between Mr. Eglin, Babki, the union business agent, a union electrical workman and myself. Mr. Babki said to Mr. Eglin:

"Mr. West is a nonunion electrician, and you must take this work out and let this union electrician do it over."

Mr. Eglin said: "The work is all finished and approved by the electrical inspector of Garfield Heights."

Mr. Babki said: "It makes no difference. We will show you who is running this town. We will tie up all the rest of your jobs."

Then the union electrician tore out all the wires and did the work over. I was not paid anything for my work.

Upon a change of officers of the electricians' union in July, 1927, I asked Mr. Fitzgerald, the new business agent, if I could sign up as a contractor and obtain union men. Mr. Fitzgerald sent me to the bonding firm of Davis & Farley to secure a bond that I would pay the wages. I went to the office of Davis & Farley, insurance brokers, and made my application for a bond. I signed an application showing a net worth of much in excess of the bond. Then the representative of the bonding company said:

"Before we can write the bond, we must have the approval of the Electrical Contractors' Association."

After that I was told by the bonding company that they would not write the bond, and then I discovered that the business representative of the Electrical Contractors' Association was the Mr. Sickman mentioned above, a former officer and still a member of the electricians' union.

There are no colored union men in the electricians' union except one man who is so light in color that he is not suspected by the union members as being a colored man.

Through all of these affairs I have lost all of my property, consisting of my home and another piece of property which I owned and rented.

This is one of the numerous cases. My friend, Mr. Davis, will refer to others.

These cases would seem to indicate that the labor unions are not only unfair to colored labor outside of the unions, but even in the unions will go to any extreme to discourage colored workmen, and to monopolize the various trades for white workmen.

The Shipstead bill in effect says that Federal equity courts shall have no jurisdiction to grant injunctions except for the protection of tangible and transferable property. That is to say, if a man is skilled in a trade, he can not be protected from unlawful molestation in the exercise of his art by the writ of injunction. If by his skill or his thrift he has purchased a home, an injunction would like to protect it from interference or injury, or to protect his property right in it, but his right to work and earn a living could not be protected because neither transferable nor tangible. The denial of Mr. West's right to work resulted in the loss of his two houses, which certainly were tangible and transferable.

The case of Wills *v.* Local No. 106 of the Hotel and Restaurant Employees' International Alliance et al,, decided July 2, 1927, an injunction was granted against the picketing of an eating house because it employed colored waiters, who were not admitted to the union.

It is a case very much in point, and Mr. Davis will present it in somewhat fuller detail.

This bill is class legislation pure and simple, and in that connection I quote what Judge W. H. Taft said in his inaugural address as president of the American Bar Association, October 20, 1914:

The great political power that labor combinations are believed to exercise has enabled them successfully to press upon legislatures the idea that they are politically a privileged class, that the interest of the community lies in making them so, and that their cause is so important that the ordinary means of enforcing the law against their violations of it should be weakened rather than strengthened.

It is quite possible, it would be only human nature, if colored working men were granted, as union members, equal rights and privileges, and entitled to benefit equally by whatever union labor might achieve in the way of power or influence or reward, that they might not oppose this bill. But the fact is that by the labor unions as a rule, they are treated as an alien and economically unassimable element, and therefore denied these benefits. This, therefore, is good reason for them to protest against the favorable consideration of this bill. It can do them no good under the circumstances, and certainly might be invoked at times to their very serious injury. I have no doubt that should this bill be enacted, the unions would press similar legislation as applied to State courts and the fact that it was Federal law would be their strongest argument.

One of the greatest dangers of this bill is the precedent it will set for State legislatures. Once the right of injunction is denied in the Federal courts, the natural tendency would be for the States to follow suit, and therein lies an additional menace to colored labor. Injunction is supposed to lie when the injury can not be compensated for in damages, and some State courts having held that a labor union can not be sued as a union—in other words, that while it may exercise many of the privileges of a corporation, it can not be held to the responsibilities of such legal entity—injunction is substantially the only remedy.

The fourteenth amendment to the Constitution provides in section 1 of said amendment, "Nor shall any State deprive any person of life, liberty, or property, without due process of law," and continues by way of an enforcement clause, "nor deny to any person within its jurisdiction the equal protection of the laws," meaning, as applied to this amendment, the equal protection of this law because a provision of the Constitution is one of the highest laws.

Now, the effect of this provision of the Constitution is that the State guarantees to every citizen the protection of life, liberty, and property, unless he has forfeited his life or liberty by crime. For a man to live, unless he be one of the favored few, which working men are not, it is necessary that he work, and any action of any person or body of men which deprives him of the opportunity to work or denies his right to work, is in effect a denial of the right to live.

Now, the right to work, although, as I have shown, probably the most valuable of man's rights, and therefore in the highest sense of the word property, is not tangible, you can not touch it or weight it or measure it; it is not transferable.

In the case of the colored workman, as of perhaps the majority of working men, the right to work, the right to a job, is the most valuable right that he possesses. It is the right which the unions have stressed, it is in fact the basis of the union organizations, with the fatal defect that they claim to confine that right to the members of heir own organizations, and to limit their membership. They say to the negro, "You can not become a member of our union; you

can not work unless you are a union man," which in effect is to say, "you shall not work at all," and with the only orderly and effective method of enforcing the right to live abolished by this bill the Federal Government is powerless to enforce this provision as the State governments will be when they have also enacted such laws. Of course, if this be true, and the courts reason as I do, the bill is plainly unconstitutional, and in effect would turn out to be mere beau geste, a beautiful gaseture to tickle the labor unions.

I would not for the world suggest that this honorable committee would be influenced by mere political considerations. The labor unions include, I believe, several million members, mostly voters. The colored people of the United States number twelve or thirteen millions of citizens, all of whom, with the usual exceptions of minors and those subject to other disqualifications, are potential voters and their actual vote is becoming an increasingly important and effective political factor, and they do not desire to see what little protection they have or may have through the courts against union discrimination and tyranny taken away from them by this bill.

STATEMENT OF HARRY E. DAVIS, ATTORNEY AT LAW AND A MEMBER OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF OHIO, CLEVELAND, OHIO

Mr. DAVIS. I am an attorney of Cleveland, Ohio, and I have just completed my fourth term as a member of the Legislature of Ohio, and during my last two terms it was my fortune to serve as chairman of the codes committee in the Ohio House, which occupies the same relative position in the Ohio House as the Judiciary Committee occupies in the Senate.

I appear here as a representative of the legal committee of the Cleveland branch of the National Association for the Advancement of the Colored people.

In appearing before this subcommitte in opposition to the so-called Shipstead bill, I want to make it clear that I am not primarily interested in the constitutional or legal phases of the measure nor am I at all concerned in the controversy between employers and labor unions regarding this measure. My sole interest in being here is to prevent what I believe is a gross injustice to a submerged group of people, the colored people, 12,000,000 in numbers, 95 per cent of whom are of the working classes. That is the class I want to speak for because for the most part they are inarticulate.

The bill would deny the right of equitable intervention of our courts in all cases except where tangible and transferable property was concerned. I take it that physical property is the easiest thing in the world to protect by the police power of the State.

The group I represent has not got very much physical or tangible property and their biggest asset is their right to a job, recognized as a contract, but an intangible right, and I maintain that if this bill becomes a law it would affect very materially their right to the biggest thing which they have, the right to earn a living.

I think it is a matter of common knowledge that labor unions do directly and indirectly discriminate against colored men belonging to the unions. I could pile up oceans of evidence on that if necessary.

I think that is covered in Mr. Chesnutt's argument. It shows the attitude of a considerable number of both the national and international labor organizations and they could be multiplied by the addition of local bodies.

It logically follows that if the colored workers, who by the way may want to join a labor union and can't, it logically follows that a colored worker who is denied the protection and the benefits of organized labor because they will not take him in, has only one place of redress in case his right of employment is assailed, and that is in our courts, and that, in my judgment, is the inherent vice and inequity of this bill, and that is why I am here talking about it.

Colored people are not as yet aware just what this bill means to them. If they were, they would be here in greater numbers, and still will be here yet I think in greater numbers, letting you know what they think about it.

I do not want the committee to think we are conjuring up hypothetical or academic objections about this. It is a very real thing in the life of the colored workers and I want to say parenthetically I have no particular feeling one way or the other about labor unions.

If I were a craftsman or an artisan, I would join a union. I have, from time to time, advised clients in my home city to join unions, just like I joined the bar association.

This is not a hypothetical objection which we are conjuring up, and I want to refer to the case which Mr. Chesnutt suggested, because it is typical of a great many cases which happen. This happened right in Cleveland, Ohio, and while I was not counsel for either side, I have never represented anybody in a labor dispute.

This is the case of Wills *v.* Local No. 106 of the Hotel and Restaurant Employees International Alliance, et al, decided July 2, 1927.

The syllabus reads:

> Injunction lies against the boycott of an eating place by a branch of the Hotel and Restaurant Employees International Alliance, where the sole ground of the boycott is that the place is employing colored help, and it appears that the application of these colored employees for a charter for a Waiters and Restaurant Employees Union has been denied on racial grounds.

And the opinion by Judge Irving Carpenter reads as follows:

> This is an action seeking an injunction to restrain the defendants from picketing plaintiff's place of business, a country roadhouse, with from three to five automobiles in the highway in front, all bearing banners saying that plaintiff's place is "unfair to organized labor."
>
> The admitted and undisputed facts reveal a very unusual situation. It differs in several respects from most cases of this character.
>
> Plaintiff's property is located in the village of Valley View, one of the numerous suburban municipalities in this county, and is 11 miles from the Cleveland Public Square; it is on a country road which is improved with a pavement about 14 feet wide; there are several somewhat separated houses on the same side of the road as plaintiff's property, but on the opposite side and next to the highway line is a canal; in fact the highway is called Canal Road.
>
> Plaintiff's property consists of about 3 acres of land on which is located a building used by the plaintiff and his family the year around as a residence and a large restaurant, capable of serving 275 to 300 guests at once. This business is only operated in the summer and during the mild weather of spring and fall. The week-day patronage is very small, and some evenings of the week slight. Saturday night and Sunday and holidays are the only time business is brisk.

Plaintiff began the business four years ago last spring, and since then has purchased the property paying for it, he says, $18,000 and since has made some improvements and additions to it.

The first three years of plaintiff's operation of the place he employed union waiters and cooks exclusively, but he says, that owing to the distance of the place from the city of Cleveland and his intermittant and irregular demand for such help that the union waiters and cooks were dissatisfied and did not render service satisfactory to plaintiff or his patrons. Hence a year ago last spring he did not employ union help, but instead hired nonunion colored waiters and cooks. He paid them the same scale of wage as fixed by the union, and the conditions under which they were required to work conformed to the union standard in every respect. He employs four regular waiters and five extras who only come on special occasions when crowds are expected. The number of cooks employed are not shown by the evidence, but from the number of waiters it can be inferred it is not large.

Last year the union said nothing to him about his employees, and at the beginning of this season, by verbal contracts, he reemployed substantially the same group of colored waiters and cooks for this reason. About two days before he planned to reopen his place, the first part of last April, defendant Edward Whissemore, business agent of defendant Local No. 106, the Waiters Union, and Martin Spiegel, the vice president of that local, called upon him and demanded of him that he employ white help and members of their union. He told them they were too late, that he had already reemployed his help of last season, that it had been satisfactory, and that the union help in years before had not been. They told him he might take his choice of any of their unemployed members. This he refused under the circumstances, and they told him they would "give him a battle."

Some time later they began the picketing by the use of automobiles upon the road in front of his place at the times when his customers would be going there, particularly Saturday nights. The automobiles bore on the back thereof large cloth banners which said in large letters in substance that "Wills's Terrace Garden is unfair to organized labor," and was signed by the initials of the union. There is some dispute about the conduct of the drivers of the automobiles and the persons riding with them.

In all about 25 men and women, all members of the defendant unions or their wives, participated in driving or riding in these automobiles.

After this agitation started, at the request of plaintiff, two of his colored employees went to Cincinnati, to the international headquarters of the union, and saw the secretary of the supreme body, and asked if a charter for a colored local for Cleveland could be granted to them and other colored waiters there. He told them to see defendant Whissemore, and if he would consent to it the charter might be arranged, but not unless approved by Whissemore. They saw Mr. Whissemore and he told them "Nothing doing," and their efforts to form a union ceased. It should be added that the constitution of defendant Local No. 106 restricts its membership to white persons.

At this length these facts have been here stated, and from them it appears that there existed no real trade dispute; both the employer and his employees are satisfied with each other, the standards of the union, both as to wages and working conditions, are being observed.

The employees wanted to affiliate with the union and the employer wanted them to, and they went to no little trouble trying to do so, and were refused by these defendants solely because of their race.

This court recognized the very well established rights of union labor under certain conditions to inform the public of the fact than an employer does not employ union labor, and the employer who chooses not to do so can not complain if such information causes loss to his business. There are many precedents, in Ohio and elsewhere, supporting this proposition. The case of Clark Lunch Co. *v.* Local 106 (22 Ohio App., 265), by the court of appeals of this district is one of the outstanding authorities on this subject, but from the above-stated facts this case differs very materially from the Clark case in many respects. To much the same effect is the La France, etc., *v.* Brotherhood (108 O. S. 61). Modern industrial conditions have made necessary the cooperation of the laboring group, and the union has generally very well ministered to this necessity. The ideal of all union efforts is and must be the improvements of the social and economic conditions of those who work, and the law seeks to protect the union in the fair accomplishment of such ideal.

The boycott does not appeal to this court of equity as conforming to this standard. In its last analysis it is a case of white men opposing colored men. As this court sees it the only information these defendants could properly and truthfully give the public about plaintiff is that he employs colored people, and I do not believe these defendants care to advertise that fact as such.

It does not appeal to this court of equity as fair for these defendants to say to the public that plaintiff is "unfair to organized labor" under the undisputed facts.

The motive prompting this attack on the plaintiff under these circumstances can not be justified by this court. In fact the witness, Martin Spiegel, who in addition to being vice president of Local 106, is custodian of the headquarters of both the defendant locals, to which service he gives his entire time and receives a salary of $60 per week, frankly says that he conceived this campaign against Wills. To quote him:

"I started picketing because I wanted him to employ white waiters. I got the banners. I did this work to gain votes in the election next week—that I may be reelected custodian. If you expect to hold office in a union, you must do something for the union."

This court feels that under all these circumstances justice requires that the temporary restraining order prayed for be granted and such order may issue on the execution by the plaintiff of a bond in the sum of $600.

It has been urged that plaintiff, having made contracts with his employees for this season, it is unlawful for defendants by this boycott to seek to coerce him into violating and abrogating such contract. But in view of the fact that the injunction is based upon rights of the plaintiff, more important in the opinion of this court than such contracts, this claim has not been seriously examined or considered and is not here decided. Nor does the court find it necessary to express any opinion as to the manner in which the picketing was conducted.

Now the court states all the facts. They were not disputed, as a matter of fact. This man Wills had a road house 12 miles outside of Cleveland. He employed white union waiters in the beginning and their work was more or less unsatisfactory but owing to the distance of the place from the city of Cleveland and his intermittent and irregular demand for help the union waiters and cooks were dissatisfied and did not render satisfactory service to plaintiff or his patrons. So in 1926 he employed a crew of colored waiters and cooks, and in 1927 he reemployed all of these by verbal contracts.

The union said nothing to him in 1926, but in 1927 one of the defendants, Edward Whissemore, the business agent of local 106 of the Waiters' Union, and Martin Spiegel, the vice president of that local, called upon him and demanded that he employ white help and members of their union. That was the demand, white help. See if there is discrimination against colored men in unions. He told them they were too late, that he had already employed his help of last season, that it had been satisfactory, and that the union help in years before had not been. They told him he might take his choice of any of their unemployed members and he refused to do this under the circumstances and they told him they would give him a battle.

They employed three or four automobiles, with banners on them and drove up and down in front of his roadhouse. It is a very narrow road, 14 feet wide and the automobiles bore on the back large cloth banners which said in large letters in substance that Wills Terrace Garden is unfair to organized labor.

Now, I have stated that colored men were not opposed to organized labor. These waiters then employed by this man Wills went down to Cincinnati at their own expense to the international headquarters of the organization and asked for a charter. They said, "We want to be union men and always wanted to be," and the secretary said,

"We can not give you a charter unless you get the consent of the local union."

So they went back and asked the local secretary to take them in either as union men or consent to their application for a charter and his answer was very brief and concise. He said, "Nothing doing," and I want to add right here, and this is the finding of the court I am reading:

At this length these facts have been here stated, and from them it appears that there existed no real trade dispute; both the employer and his employees are satisfied with each other, the standards of the union, both as to wages and working conditions, are being observed.

The employees wanted to affiliate with the union and the employer wanted them to, and they went to no little trouble trying to do so, and were refused by these defendants, solely because of their race.

This court recognized the very well established rights of union labor under certain conditions to inform the public of the fact that an employer does not employ union labor, and the employer who chooses not to do so can not complain if such information causes loss to his business. There are many precedents, in Ohio and elsewhere, supporting this proposition. The case of Clark Lunch Co. *v.* Local 106 (22 Ohio App. 265), by the court of appeals of this district is one of the outstanding authorities on this subject, but from the above stated facts this case differs very materially from the Clark case in many respects. To much the same effect is La France, etc., *v.* Brotherhood (108 O. S. 61). Modern industrial conditions have made necessary the cooperation of the laboring group, and the union has generally very well ministered to this necessity. The ideal of all union efforts is and must be the improvement of the social and economic conditions of those who work, and the law seeks to protect the union in the fair accomplishment of such ideal.

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The motive prompting this attack on the plaintiff under these circumstances can not be justified by this court. In fact the witness Martin Spiegel, who, in addition to being vice president of Local 106, is custodian of the headquarters of both of the defendant locals, to which service he gives his entire time and receives a salary of $60 per week, frankly says that he conceived this campaign against Wills. To quote him—

Now, this is rich, Senator—

"I started picketing because I wanted him to employ white waiters. I got the banners; I did this work to gain votes in the election next week, that I may be reelected custodian. If you expect to hold office in a union, you must do something for the union."

This court feels that under all these circumstances justice requires that the temporary restraining order prayed for be granted and such order may issue on the execution by the plaintiff of a bond in the sum of $600.

That is a typical case, your honor. We are not trying to conjure up anything hypothetical or academic. We are not trying to construct this thing out of thin air or ether. This is what is actually going on in the city where I was born and raised, not in a section where it might be attributed to local prejudice or conditions. I challenge anybody to justify the attitude of that labor union. It is impossible to conceive of anything more inequitable, unjust, arrogant or unfair than the attitude of that labor union. This is only one case and I am citing it because it is typical.

I can pile them up, I believe, if this committee cared to hear them.

Colored workers want just as good wages and just as good working conditions as anybody else. Don't let anybody think colored labor is cheap labor. They are just as much interested in getting the best out of life as anybody else and are striving toward that end daily and they want that right protected and they are willing to join unions to secure that protection but in so many of the unions that we can almost call it a rule they are unfair to colored men. There are isolated cases where unions do admit colored men and some cases where they are treated fairly and with no difficulty over racial disputes. I think the Longshoremen's Union is principally the fairest in the country in that respect. Colored and white men work together and socialize together to some extent and they allow no race prejudice to get in there. It has been attempted but they will not listen to it, and absolute harmony prevails and colored men would be good union men if they would let them be and while this action which I have mentioned was started by the employer, yet I think you will all agree with me that any one of these aggrieved colored waiters could have taken the same action. I want it kept in mind all through that if this bill passes the Federal Congress, it will become a model and a pattern for State legislation all over the country and within 10 years every State in the Union will have substantially the same law.

What position is a colored worker in, willing to join a union, and he can not, and yet they say to an employer, "You can not hire these colored men because they are not union men," and they say to the colored men, "You can not work because you are not a union man"? What is he going to do? Does anyone mean to tell me the strong legislative arm of the United States Government is going to lend sanction to a bill which will take from a man the only remedy or redress which they could have under such circumstances, the right to appeal to a court to protect their right to work, and my protest is brought on behalf of that submerged group who have no one to appeal to, who do not get the protection or benefits of organized labor and as a last resort must come to our courts.

Courts are primarily intended for the protection of minorities. Majorities are not oppressed, but minorities may be, and these courts of equity which have grown up with a background of thousands of years are here to protect minorities and to protect the submerged group of 12,000,000 colored people who have no protection, strength of power, and can not get in the union, and it seems to me absolutely unjust for Congress to even think of passing a law which would deny their only appeal, an appeal to the courts for their redress.

I thank you.

Senator NORRIS. The hearing will now adjourn to 10.30 o'clock to-morrow morning.

(Whereupon, at 1.15 o'clock p. m., Thursday, March 15, 1928, the hearing was adjourned to 10.30 o'clock a. m., Friday, March 16, 1928.)

LIMITING SCOPE OF INJUNCTIONS IN LABOR DISPUTES

FRIDAY, MARCH 16, 1928

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to adjournment, at 10.30 o'clock a. m. in the committee room, Capitol, Senator George W. Norris presiding.

Present: Senator Norris (chairman).

STATEMENT BY HENRY WARRUM, REPRESENTING THE UNITED MINE WORKERS OF AMERICA

Mr. WARRUM. Mr. Chairman, I—as Mr. Glasgow yesterday did—I am appearing to-day before you to present the situation that the United Mine Workers of America find themselves in with regard to the extension of the injunctive process by Federal courts.

There is in my opinion no trade union that has suffered more than the mine workers have from the application of the injunctive writ. There is a reason for it that is very obvious. In the first place, the industry is over developed and, therefore, over manned; and, in the second place, there is perhaps nothing that is put on the market in which the labor cost bears as high a proportion to the entire productive cost as coal.

The great item in producing coal is the labor cost. The result is, considering no other factors at all, that there is a tremendous struggle over the labor question. Efforts are made on the part of operators to disorganize the craft organization and to depress wages. That is the one item in which they can by methods of deflation anticipate an increase in their profits very materially. Efforts, on the other hand, are made by the union to increase its membership and enlarge the solidarity of the collective bargaining by mine labor with employing operators because they realize that the competitive condition, the cutthroat competition prevailing in the mining industry, which is reflected in constant effort to decrease their wages, grows out of unorganized mine labor and a failure in potential fields to have any standard scale of wages at all.

The result is that in substantially every Federal court where soft coal is produced there have been Federal injunctions against the miners' organizations, its officers and members, and in the State courts, where the operators feel that they have friendly courts, or are in more or less control of the politics that dominates the community, there have been hundreds, truly hundreds, of injunctions issued against the miners. In northern West Virginia alone, in the last

two and a half years, there have been over 200 injunctions issued by State courts.

Now, the purpose of these injunctions, both Federal and State, is primarily not to protect property. The primary purpose is to disorganize the miners' organizations, to destroy the morale of the union miners, whether they are engaged in an attempt to organize nonunion fields, or carrying on a strike in the organized mines, that and the desire to terrorize and intimidate, drive out of the community the organizers and representatives of the miners' union.

It will be astonishing to you, and I hope to call your attention briefly to some of the things that have been resorted to in these injunctive writs, but making a very general statement I would say that they have enjoined parades on the public highways. They have tabooed mass meetings in the miners' halls on their own property, and on the open grounds that do not belong to the coal company at all and involves no trespass. They have enjoined meetings in churches, and as you may know from the report of the subcommittee of the Interstate Commerce Committee, which has recently been published, they have frowned upon the singing of hymns in religious assemblies.

I recall one instance, Senator, in Arkansas where the women and children—this may have been a device to secure the withdrawal of the nonunion labor, but this is the nature of the device—they gathered on the public highway near the pit mouth and prayed, to the serious displeasure of the chancellor who threatened them with contempt proceedings if it was repeated.

They have thundered against fair argument and persuasion, and in many instances that has been the expressed object of the inhibition laid upon the miners. They have, as Mr. Glasgow, I understand, showed you yesterday, established the proposition that while mining in itself is not interstate commerce, and interfering with mining is not an interference with interstate commerce, they have, nevertheless in a great many places, established the doctrine that the miners, by reason of the fact that they were interfering with the production of coal, and were active in trying to transform that product from nonunion to union conditions, were necessarily engaged in a conspiracy in restraint of interstate commerce, and that the purpose and intent would be inputed to them under the circumstances of violating, or intending to violate, the antitrust laws of the United States.

Now, I have spoken just for a moment about State and Federal injunctions. I am aware that this committee is only interested in Federal injunctions. In a moment I want to take up some of them and discuss them, but it seems to me there is an interrelation between Federal injunctions issued in labor disputes and injunctions issued by the State courts in labor disputes. There can not be any question with a lawyer but what the decisions of the Federal courts, especially of the Supreme Court of the United States, on abstract questions of equity and indicating a general trend in the policy of the law, has a powerful influence over the judgments and decisions of the State courts.

That must be especially true where the policy of the Federal courts—the trend of their decisions, the advance that they are making in the use of the injunctive processes in intervening in and settling

economic struggles—is regarded with indifference by Congress and no attempt made to restrain it.

Under such circumstances it is not difficult for a fair judge to feel, and the supreme court of the States—various States—to feel that this is the inevitable trend of legislation in this country; that this is the inevitable development of a body of law, body of equity jurisprudence that relates to labor disputes, and they are inclined, except in some instances, as in New York the other day, to fall in step.

Now, you take, for instance, the cases arising in Indiana County, Pa.—injunctions that have been issued in the present strike, or since April of last year. They have been, as you know, Senator, the subject of sarcastic comments and of indignant protests on the part of some very learned lawyers that are on the subcommittee—Senator Wheeler, Senator Sackett, and lay members, such as Senator Gooding.

They all date back to the injunction that was issued in the Indiana Coal Co. case by the Supreme Court of Pennsylvania in 1926. I have not the title of the case here but I can secure it for you, but in that case there had been parades, and the court held, and perhaps was right in so holding, that the parades up and down the public highways had a tendency to intimidate the employees of the company, but having decided that, the trial court further held that they were not entitled to any pickets at all; not entitled to any access to the pool of nonunion labor that was being employed in those mines.

The case went to the Supreme Court and the Supreme Court, borrowing from the decision of the Federal court in the Foundries case, the idea that in this class of litigation the trial judge has a peculiar knowledge of the situation that entitles his injunctive decree, no matter how unfair it may seem on its face, no matter how capricious the terms may be, having this peculiar information regarding the local situation, that the restraint that is imposed upon the defendants will be, under ordinary circumstances, sustained. An illustration of the way, and the basis of that authority, is found in a sentence, and is quoted by the Supreme Court of Pennsylvania from the decision of the United States Supreme Court in the Foundries case.

The action of the State courts upon the Federal courts, showing the reciprocal relation that exists in the administration of our equity jurisprudence, can be seen in this Red Jacket case discussed yesterday. Now, the question of the right of equity to affect miners arose in that case.

There was a preliminary order made by the district judge at Charleston, first that they should vacate in 10 days or be declared in contempt of the injunction which was extended to 30 days, and that question came up for some consideration by the circuit court of appeals on the appeal from the final decree, and that circuit court of appeals referred to a decision by the Supreme Court of West Virginia in the Black Band case, I believe they call it, in which the doctrine is laid down that miners occupying company houses do not occupy the relation to their employer of tenant and landlord, that they are servants, that the occupancy is at will, and that they can be removed by injunctive process regardless of the fact that every State in this Union, West Virginia as well, has ample remedies

at law for a landlord to dispossess his tenants or to terminate his tenancy.

So, borrowed from this decision of the Supreme Court of West Virginia, the Federal court for that circuit now has adopted the rule that the relation of landlord and tenant does not exist and does not prevail between the operators and the miners who live in the company houses, and that rule having been adopted there has been extended since that decision to Ohio in the Clarkson case, to which I will refer, and to Pennsylvania in the Pittsburgh Terminal case. That has been discussed by the other side some time ago, as I understand.

In order to get immediately to the question of these Federal injunctions that we are desirous of bringing to your attention as illustrating the trend and policy of the courts, I want to take up at once the Hitchman Coal Co. case.

Now, the Hitchman Coal Co. decree was rendered in 1908. It was afterwards taken to the Supreme Court and decided in the 245 U. S in 1916, but the decree was rendered in 1908, and it had to do with a controversy existing at that time, an attempt to organize the employees of the Hitchman Coal Co. at that particular time, and had to do with the devices resorted to by the organizers, Mr. Hughes and others at that particular time. It dealt with the facts of that particular struggle in 1908, and the court held that by reason of the fact that they had a contract with their employees whereby their employees agreed not to become members of the United Mine Workers of America, or any other trade union, while in the service of the employer, and by reason of the further fact that this man Hughes, the organizer of the mine workers, had secretly attempted to organize them, organize them while they were still working for their employer; that he did it with deceit, that he also indulged in false statements concerning the condition of the company and the future policy of the company and that those things indicated his malice, as I read this decision of the Supreme Court, indicated his malice and justified the decree of Judge Bayton of the district court, enjoining them from the peaceful persuasion of the coal company's employees under those circumstances.

And, as bearing out our idea as to the limitations imposed upon the rule there adopted, the American Steel Foundries case was decided in, I believe it was 1921, yes. That Steel Foundries case may have been discussed yesterday. I do not know, but I want to call attention to what the Supreme Court said [reading]:

> Is interference of a labor organization by persuasion and appeal to induce a strike against low wages, under such circumstances, without lawful excuse and malicious? We think not. Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation.

Then follows some discussion along the lines of the economic justification and defense of labor unions.

It continues [reading]:

> The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond

one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood.

In that case his attention was directed, and was held by the counsel for the American Steel Foundries to the decision that they had rendered in the Hitchman Coal Co. case, the court in the Foundries case, in 1921, five years after the decision in the Hitchman case, differentiated, declined to be bound by the decision in the Hitchman case upon this question of persuading employees to either strike or to join the union, declined to hold that such persuasion in itself was malicious and actionable, pointed out that in the Hitchman case the elements of malice were not only involved but proven by the devious methods adopted by the organizer, Hughes, his surreptitious acts in getting the employees to secretly sign as members of the union while remaining in the employ of the company, and the false statements that he made concerning the future policy of the company for the purpose of securing a withdrawal of their labor.

So we felt, after the decision in the Steel Foundries case that at least we stood in this position that if we should proceed openly without any other method than fair argument and public appeal to the employees of coal corporations that had engaged their men under the "yellow-dog" contracts, asking them openly, peaceably, and by fair argument and reasoning to quit their employ and join the union, that we would have come within the definition laid down in the Hitchman case as illustrated, or limited, if you please, by the decision of the Supreme Court in the Foundries case, that after the Foundries case was decided it was open notice to the world that a labor union would have an interest in a controversy of that kind, would have an interest in their wages, the integrity of which was being threatened by the working of nonunion labor at a lower wage, and have a right to extend their membership for the purpose of promoting and protecting the integrity of their organization. That they had a legitimate interest that rejected the suggestion of malice and entitled them to solicit fairly and by peaceable means the membership and the suspension of work of mine labor that was employed under those circumstances.

Now, let me show your honor what the Federal courts have done upon that proposition. That was in 1921. If anyone thinks that the decision of the American Steel Foundries case has limited to any extent, in one particular, the application of the restraint against persuasion and fair argument, this contempt proceeding will dissipate such views because the Hitchman Coal & Coke Co. in 1922 filed a contempt proceeding in the Federal court in which the Hitchman case originated.

I want to call your attention to it. This is a contempt proceeding, an information in criminal contempt against Lewis, Murray, Green, Watkins, Bittner, Lee Hall, William Roy, Savage, Ledvinka, and others, most of them being officers of the international organization or the district organization. They set out the decree in the Hitchman case, sections of it, that is [reading]:

(1) From interfering and from combining, conspiring, or attempting to interfere with the employees of the plaintiff * * *.

They point out that these parties, the original defendants of that suit, and all their successors in office, and not members in the association, have been restrained from interfering and from [reading]—

From interfering and from combining, conspiring, or attempting to interfere with the employees of the plaintiff for the purpose of unionizing plaintiff's mine without plaintiff's consent, by representing or causing to be represented in express or implied terms, to any of plaintiff's employees, or to any person who might become an employee of plaintiff, that such person will suffer or is likely to suffer some loss or trouble in continuing in or in entering the employment of plaintiff, assigning, representing, or causing to be represented in express or implied terms to such employee or employees that such loss or trouble will or may come by reason of plaintiff not recognizing the United Mine Workers of America, or because plaintiff runs a nonunion mine.

(2) From interfering and from combining, conspiring, or attempting to interfere with employees of plaintiff for the purpose of unionizing plaintiff's mine, without plaintiff's consent, and in aid of such purpose knowingly and willfully bringing about in any manner the breaking by plaintiff's employees of contracts of service known to them at the time to exist, which plaintiff now has with its employees, and from knowingly and willfully bringing about in any manner the breaking by plaintiff's employees of contracts of service which may hereafter be entered into by persons with plaintiff and be known to them while the relationship of employer and employee, as to such employee so brought to break his contract exists.

(3) And especially from knowingly and willfully enticing plaintiff's employees, present or future, knowing of such relationship, while the relationship of employer and employee, as to such employee so enticed, exists to leave plaintiff's service, giving or assigning directly or indirectly as a reason for any such act so brought about, or enticement and leaving of plaintiff's service, that plaintiff does not recognize the United Mine Workers of America, or that plaintiff runs a nonunion mine, or that the interest of the United Mine Workers of American requires that plaintiff shall not be permitted to run a nonunion mine, or that the interest of the union will be best promoted thereby.

(4) From interfering and from combining, conspiring, or attempting to interfere with the employees of plaintiff so as knowingly and willfully to bring about in any manner the breaking by plaintiff's employees of contracts of service, known to them at the time to exist, which plaintiff now has with its employees, and from knowingly and willfully bringing about in any manner the breaking by plaintiff's employees of contracts of service which may hereafter be entered into by persons with plaintiff, and be known to them, while the relationship of employer and employee, as to such employee so brought to break his contract, exists, and especially from knowingly and willfully enticing plaintiff's employees, present or future, knowing of such relationship, while the relationship of employer and employee, as to such employee so enticed, exists to leave plaintiff's service, without plaintiff's consent against plaintiff's will, and to plaintiff's injury.

Then follows a restatement of section 2 in somewhat different verbage and so is section 8 of the original decree, which is again a variation on the old theme that you can not fool with my labor.

Now, what are the facts upon which they rely for this criminal information, and upon what theory do they undertake to send these men to prison on the ground that they have violated this decree rendered 14 years before? Why, it is this [reading]:

And that the said last above named defendants, described as officers as aforesaid, did in furtherance of said plan do the acts and things and did cause the said other defendants to do the acts and things hereinafter charged in this petition in violation of provisions of the said injunction numbered herein (1), (2), (3), and (4).

Plaintiff charges that the said United Mine Workers of America at an international convention held at Indianapolis, Ind., in February, 1922, created a policy committee consisting of the defendants, John L. Lewis, Philip Murrau, William Green, A. R. Watkins, Van A. Bittner, and others whose names are to the petitioner unknown, which, at a meeting held at Cleveland, Ohio, March 24, 1922, for the express purpose of taking action, did on motion

of the defendant Van A. Bittner decide to and thereupon did issue "a call to all nonunion mine workers of the country to join with the union men in the suspension."

This was their offense, a call issued in general terms at Cleveland in 1922 inviting all nonunion mine workers of the country to join with the union men in their suspension. To join with them so that by the solidarity of mine labor they might more effectively achieve the object which they had in point which was a collective bargain for the uniform scale throughout the mining industry. [Reading:]

* * * that the defendants hereinbefore in this petition described as officers and each of them at the time the said action was taken by said policy committee and thereafter when being enforced and carried out by said defendants knew that the said call upon all nonunion men to join in suspension of coal mining April 1 included petitioner's employees employed at its said mine and that such action taken by said policy committee and pursued by said defendants, officers of the United Mine Workers of America, and others named, was in direct and wilful violation of said injunction, and, notwithstanding their said knowledge of the said injunction, that they, the said defendants, hereinbefore named as officers of the United Mine Workers of America, and the other defendants named did knowingly and wilfully proceed to carry out and enforce the said action taken by the said policy committee, on motion of Van A. Bittner, and in pursuance thereof did, knowingly and wilfully, the acts and things hereinafter charged in violation of said injunction.

Now, they charge some of the individuals. That is against the officers. They charge some of the individuals. I will be brief, because this is a tremendously long information. [Reading:]

Petitioner charges that the defendants, named and described as officers of the United Mine Workers of America, did, on the morning of April 4, 1922, cause three men who were their agents, servants, and confederates to approach plaintiff's mine, and to then and there entice and induce him by means of argument and persuasion to return to his home and to fail and refuse to work at the same mine from and after the last mentioned date.

The point I wish to make is that the attorneys who drafted this bill, the coal company that employed them, and the court that issued the injunction and passed upon this information in the manner that I will presently point out to you, puts beyond peradventure the proposition that it was unlawful, that it had become unlawful in that part of the United States to talk fairly to a man and ask him by methods that they otherwise characterized, but in their contempt of our miserable situation, characterized themselves as arguments and persuasion.

Now, let us see some more. They make no bones about it. Whatever may be said by them when they come before the committee here when we go back and face these injunctions, we know exactly where we stand and we are met by them with the proposition that we have no right to talk to their men, and not only are the miners frowned upon by the Federal judges in issuing these injunctions, but the attorneys that represent them are stood on their feet and told that they will be responsible for the carrying out of these inhibitions upon rights that are the common inheritance of American citizens.

Let me read a little more [reading]:

Petitioner charges that on the morning of April 5, 1922, the defendants, Mike Sheftic (alias Mike Chefski), Dan Thom, and Frank Gay, accompanied by 10 or 11 other men, whose names are to your petitioner unknown, approached plaintiff's employee Mike Osminski at Forty-third Street, in Wheeling, W. Va., when he was on his way to work at petitioner's mine, and did then and there entire and induce by means of argument and persuasion, petitioner's said em-

ployee to return to his home and to quit working at petitioner's mine, and by means of the said enticement, inducement, argument, and persuasion, cause petitioner's said employee to break his contract of service known to said defendants to exist, and to fail and refuse to work at petitioner's mine from and after the last-mentioned date. Petitioner charges that the said defendants, Mike Sheftic (alias Mike Chefski), Dan Thom, and Frank Gay, did knowingly and willfully the acts and things charged in this paragraph in violation of provisions of the said injunction herein numbered (1), (2), (3), and (4). Petitioner charges that the defendants, hereinbefore in this petition named and described as officers, did knowingly and willfully cause the said defendants, Mike Sheftic (alias Mike Chefski), Dan Thom, and Frank Gay, to do the acts and things charged in this paragraph in violation of provisions of the said injunction herein numbered (1), (2), (3), and (4).

Petitioner charges that the defendants, hereinbefore named and described as officers, did on April 5, 1922, cause four men, whose names are unknown to petitioner, and who were agents, servants, and confederates of the said defendants, to approach petitioner's employee, Mike Nesdi, when he was on his way to work at plaintiff's mine, and to entice and induce, by means of argument and persuasion, petitioner's said employee to quit working at your petitioner's mine, to break his contract of service known to them to exist, to fail and refuse to further perform his duties as your petitioner's employee, to return to his home, and to remain away from petitioner's mine from and after the said last-mentioned date. Petitioner charges the said defendants did then and there cause their said agents, servants, and confederates to entice and induce, by means of argument and persuasion, petitioner's employee, Mike Nesdi, to come to the meetings of the United Mine Workers of America—

What a horrible offense that is in the United States, at least, in that part of West Virginia. [Reading:]

* * * and to join or become a member of the United Mine Workers of America, and to say to him, the said Mike Nesdi, that a local union of the United Mine Workers for the miners employed at petitioner's mine had been formed, and asked him to join the said local union, and to represent to him, the said Mike Nesdi, that the local union had then from 120 to 125 members, and, by means of argument and persuasion, to entice and induce him, petitioner's said employee, Mike Nesdi, to join the said local union of the said United Mine Workers of America.

And so on, page after page, a recital of the acts that had become offensive. How? Under laws passed by the State of West Virginia? Under laws passed by the law-making body of the United States? No; under laws that had been created as certainly as ever an edict was issued by the ukase, the capricious ukase of these Federal judges.

Now, I want to introduce into the record—I have it certified, I have a copy of it. We desire to use this before the Interstate Commerce Committee and if I may leave a copy, or leave this with a copy and get the original later, I would like to do that.

Senator NORRIS. You may leave a copy.

Mr. WARRUM. Now, let us come to the decree, because we certainly know the attorneys representing the corporations have no doubt about the full force and implication of this restraining order. Let us see what the court thinks about it. [Reading:]

It is therefore considered by the court that the said defendants, Nay Davis, William Warsinski, Charles Hawkins, Ben Williams, and Hiram Haskell, be, and each of them is hereby, required to file a bond in the penalty of $2,000, with approved surety, conditioned that they will henceforth strictly obey the injunction mentioned in this proceeding, in letter, spirit, meaning, and in every particular.

That is a new turn taken like a breach of the peace bond I suppose. [Reading:]

* * * and the said defendants are committed to the custody of the marshal until such bonds be given by the said defendants, respectively, with directions to the marshal that said defendants be confined in the jail of Ohio County, W. Va., until said bonds are given.

It may be said that these particular defendants stood at the mercy of the courts. He could have found them guilty and sentenced them to jail or to a fine. The curious thing is that without finding them expressly guilty of these charges he did find that the situation was such that he would require them to file a bond and in default of the bond to go to jail.

Now, let us go along with it. [Reading:]

And it is further considered by the court that the defendants, Lee Hall—

That is the president of the district; I think a conservative citizen and a gentleman and a man of some standing in the community. [Reading:]

William Roy, G. W. Savage, Frank Ledvinka, and William Applegarth (the said defendants by counsel agreeing and consenting thereto), and as well the other defendants herein this day appearing, shall enter into the stipulation next following and made part hereof; that is to say:

Now, look at this stipulation:

The undersigned defendants, Lee Hall, William Roy, G. W. Savage, Frank Ledvinka, William Applegarth, Ray Davis, William Warsinski, Pete Kufel, Charles Reichel, Steve Andrick, Mike Sheftic, John Dula, Frank Dula, Ignatz Dula, John Grazell, Charles Hawkins, Benjamin Williams, Frank Plarek, and Hiram Haskell, do hereby promise the court that they will, from this day forth—

Your honor, have you ever been on either side, either the side of the employer or the laborer, in a Federal court? If you have, or have been there as a spectator, you can easily visualize the scene that presented itself. Jove thundering from the bench, these defendants cowering and their attorney helpless. [Reading:]

* * * from this day forth, strictly obey the injunction described in the amended petition in the above-styled case, in letter, in spirit, and in every respect, and will not violate any of the provisions thereof.

The above-named defendants Lee Hall, William Roy, G. W. Savage, Frank Ledcinka, and William Applegarth, being officers of the United Mine Workers of America, and recognizing that the decision of the Supreme Court of the United States in the case of Hitchman Coal & Coke Co. *v.* John Mitchell et al., forbids the unionizing of that company's mine or men, they, as such officers, do promise that henceforth the United Mine Workers of America will not, by any means, direct or indirect, attempt to unionize the said mine or men of said Hitchman Coal & Coke Co., nor will the said United Mine Workers of America admit any of the employees of the said company to membership while they are in the employ of said company; nor permit, as far as lies within their power, the effectuating of any of said forbidden objects, directly or indirectly, by said United Mine Workers of America.

Then follows the signatures, and then it is further noted of record—this is all the order of the court—that [reading]:

* * * John D. Gardner, esq., counsel for defendants, agrees to draft for publication in the United Mine Workers Journal a brief statement of these proceedings and of the stipulation, calling special attention to the fact that the Hitchman mine is not to be unionized, and Hitchman employees are not to be admitted to membership in the United Mine Workers of America while they are in the employ of the Hitchman company, as well as to the fact that the injunction described in the amended petition forbids any effort to induce the Hitchman employees to leave their employment or to break their contract of service or to join the United Mine Workers of America, even by peaceful

argument or persuasion, and that any person so doing would be guilty of violating the injunction, and that the defendants will cause such statements to be published in the United Mine Workers Journal, and a copy of said Journal containing such statement, is hereby ordered to be filed and made a part of the record of this cause.

Senator NORRIS. Did these defendants who were required to furnish bond actually furnish it?

Mr. WARRUM. I think they did and these others signed the stipulation but they did so under the menace of the court and the court has no right to exercise his displeasure and to threaten the imprisonment of parties before him for seeking agreements of that sort.

Senator NORRIS. Where did this take place?

Mr. WARRUM. In Elkins, W. Va.

Senator NORRIS. When?

Mr. WARRUM. In 1922, in the fall of 1922.

Senator NORRIS. Was there any appeal or anything taken from it?

Mr. WARRUM. No appeal; they had agreed to that. I was not a party to that case. They were represented by Mr. Gardner, of, I believe, Steubenville, Ohio.

Senator NORRIS. What would have happened to them if they had not agreed?

Mr. WARRUM. I imagine that they had a rather clear vision of what would have happened before they did agree, because that is a pitiable, abject, sordid story, sordid upon the part of the court and miserable upon the part of the defendants. I do not know what would have happened, Senator, but I submit that the continuity of the story leaves very little to be inferred.

Here is one of the employment contracts. I am going to be very brief, as brief as I can, and it will perhaps lack coherency in some respects on account of the limitation of time, because I want to get through.

Here is one of the yellow-dog contracts. I am quoting just one paragraph from it. It is as long as an insurance policy. [Reading:]

I am not a member of the United Mine Workers of America, and I agree that while I am employed by said company I will not become a member of the United Mine Workers of America or any other labor organization, and that I will work for said company without regard to any rules, laws, regulations, or instructions of the United Mine Workers of America or any other labor organization.

Now, in the same court there has been another company that secured a similar decree. Both of these cases, that is the West Virginia & Pittsburgh Co., both of the cases went to the circuit court of appeals, and the circuit court of appeals reversed both decrees.

The Hitchman Co. appealed their case in the Supreme Court of the United States which reinstated the decree they had secured from the trial judge.

The other company did not appeal and therefore the mandate of the circuit court of appeals went back, fixing the law of that case; but in April of 1925, informations were filed on behalf of the West Virginia Pittsburgh Coal Co. against various mine officials and others on the theory that you had to read the decree, that they had joined, notwithstanding its modification by the circuit court of appeals, in the light of the decision of the Supreme Court in the Hitchman case, a sister case, and that they had the full benefit of the decree in the

Hitchman case. So they filed an information in contempt in the case of the West Virginia Pittsburgh Coal Co. against Van Bittner and others, and here is what they charged against Van Bittner and some of the others [reading]:

You petitioner charges that in furtherance of the said conspiracy to violate said injunction and to cause your petitioner's employees to break their contracts of service and to unionize your petitioner's mines, the defendant Van A. Bittner, did upon the evening of the 9th day of April, 1925, at the town of Farmington in the county of Marion, W. Va., make a speech to a meeting of miners in which he said, among other things, the following:

"The union will win; must win. Since the 1st of April our membership has increased 6,000, and in a short time all nonunion mines in northern West Virginia will be operated under our association, and all nonunion operators will be glad to sign up. You know what we have done this week, and next week we are going to do more.

Now, here is a statement of some other facts. That was his offense. He made a speech and they quote his speech in order to inform the court how contumacious he was of the ukase of that court, and that is the speech they rely on. [Reading:]

Your petitioner further charges that the defendants and each of them did on Tuesday, the 21st day of April, 1925, at a place near one of the openings of your petitioner's Locust Grove mine cause to be assembled a meeting at which, by their entreaties, enticement, and persuasion, a great many of your petitioner's employees at its Locust Grove mine were present, and that there and then at the said meeting the defendant, William Roy, made a speech, addressing himself directly to your petitioner's employees there assembled, urging, entreating, and enticing, by his arguments and entreaties, your petitioner's said employees to then and there quit working for your petitioner, break their contracts of service, and join the United Mine Workers of America by then and there becoming members of a local union of the United Mine Workers of America, which he proposed that they then and there organize.

Now, upon allegations of that kind, I represented the miners in that case. We were there urging that the law of the proposition was fixed by the mandate of the court of appeals in that particular case and not to be governed by the Hitchman decree. The court finally after a month's hearing, postponed from time to time, agreed, and on the day that he agreed, they filed a new bill of injunction in which they covered everything that they alleged in these informations, and secured from the court a new decree that corrected the faults of the old decree and gave them a restraint or limitation upon the activities of the officers and members of the United Mine Workers with reference to such public meetings and with reference to such persuasion and entreaty, and we appealed that case.

We appealed from that decision, and I have only time to call your attention to the modification that was made in that decree. We urged in the circuit court of appeals that the effect of their decree was to prevent us from holding public meetings, one of them being in the town of Willsboro, the county seat, and that was one of their grievances, that we had advertised that meeting in the newspapers, we knew their employees would come there, and that we were contumacious in holding such meetings, and we urged upon the circuit court of appeals that in view of the way we had been harassed before that court in these two cases, that the only interpretation to put upon the order, when we were asked by our clients how far they could go, or what they could do, required that the circuit court of appeals should modify and make clear our right to engage in peace-

ful persuasion and in their argument, and this is the way the thing was done [reading]:

> Defendants criticize the scope of the injunction, contending that its effect is to forbid the publishing and circulating of lawful arguments and the making of lawful speeches advocating membership in the union in the neighborhood of plaintiff's mines, but we do not think that this is the proper construction of the order, which is an exact copy of that which was approved by the Supreme Court of the United States in the Hitchman Coal Co. case, supra. In view of what was said by that court in American Foundries Co. *v.* Tri City Council, there can be no doubt as to the right of defendants to use all lawful propaganda to increase their membership. (See Gassaway *v.* Borderland Coal Co., supra.) But that there may be no misunderstanding in the matter, we think that the order should be modified by adding thereto the following provision:
>
> "*Provided*, That nothing herein contained shall be construed to forbid the advocacy of union membership in public speeches or by the publication or circulation of arguments when such speeches or arguments are free from threats and other devices to intimidate and from attempts to persuade the complainant's employees or any of them to violate their contracts with it."

Why, under the modification all we could do would be to hold a public meeting and if we saw one of their employees coming in the door to go out of the windows ourselves.

In other words, we could persuade up to the point of persuading one of their employees, and that was the only business that we had there. We were not there to persuade each other. We were not there to persuade steel workers or farmers. We were there for the one purpose of persuading these nonunion mine laborers, employed in these mines, and yet we are served with notice by that injunction, and had to so report to our clients, that we could hold public meetings.

Now, if the committee pleases, the Red Jacket case, discussed yesterday by Mr. Glasgow, involves two questions, one is the application of the doctrine that the United Mine Workers of America although not interfering with the transportation of goods, of coal, nor the sale or utilization in other States, is nevertheless to be charged with a conspiracy in restraint of interstate commerce, although their activities were directed toward organizing the labor producing this coal in a particular district, if the tonnage is sufficient to claim, under the doctrine laid down in the second Coronado case, a presumed intent to interfere with interstate commerce, and so in the Consolidated Red Jacket case where 2 of the 316 companies are nonresidents of West Virginia, the other 314 brought their suits, that were afterwards consolidated, in the Federal court of West Virginia, being citizens themselves of West Virginia and naming defendants to their bill citizens of West Virginia, upon the ground that the defendants, mine workers, were engaged in a conspiracy violative of the antitrust laws and in restraint of interstate commerce, and the court, as has been pointed out to you, I assume, in Mr. Glasgow's argument, held that the amount of tonnage involved in these strike activities was sufficient to create a presumed intent that our purpose was to interfere with their interstate marketing.

Senator NORRIS. That was rather in conflict with the Coronado case.

Mr. WARRUM. I thought so. We all thought so, but that case has been appealed to the circuit court of appeals, and an application for a writ of certiorari made to the United States Supreme Court, and of course, as you know, the question of jurisdiction entitles you, if you

can show there is a fair question of jurisdiction under the judiciary act, and under the rule of the Supreme Court, to a review of the case, but it was denied us, I suppose on the ground that there was no doubt about the jurisdiction of the court, predicated, as it was, upon our being in a conspiracy in restraint of interstate commerce.

Assuming that that has been rather thoroughly discussed yesterday, I want to call attention to the yellow-dog proposition involved in this case, because in this case this peculiar method of making law by courts, this peculiar method of establishing a rule of law determining human relationship and determining in perpetuity activities of organized labor through the ukase of a capricious judge, and through methods which are beyond all repeal, such as attached to the ordinary legislation enacted by legislative bodies, that in this case, involving 40,000 miners Judge McCleland has stretched an insulated wire around that pool of nonunion labor until it is impossible for us to make an appeal to them not to join the union and stay at work, which the Hitchman case says was improper, but it is impossible for us to say to them, "Terminate your contract of service. Come out on a strike and join the union. In other words, quit work and join the union." Let us hear what the circuit court of appeals said on that point. As was said in the Bittner case—you have read what they said in the Bittner case—they said that you can be persuasive up to the point where you are perfecting the object of your persuasion, and then take care. [Reading:]

As we said in the Bittner case, there can be no doubt of the right of defendants to use all lawful propaganda to increase thier membership. On the other hand, however, this right must be exercised with due regard to the rights of complainants. To make a speech or to circulate an argument under ordinary circumstances dwelling upon the advantages of union membership, is one thing.

A strike was on here, a strike in the union field, and the nonunion men were invited to join the strike. [Reading:]

To make a speech or to circulate an argument under ordinary circumstances dwelling upon the advantages of union membership, is one thing. To approach a company's employee, working under a contract not to join the union while remaining in the company's service, and induce them in violation of their contracts to join the union and go on a strike—

That is going out of the company's service. That is quitting work. That is terminating their relationship. [Reading:]

Join the union and go on a strike for the purpose of forcing the company to recognize the union or of impairing its power of production, is another and very different thing.

Why, of course, a labor union applies—when it tries to organize a factory, a workshop, or a mine, applies to the pool of nonunion labor and asks them to quit work and go out on a strike, having in mind that by organizing that element of nonunion labor they can add to the strength of the wage scale they are fighting for and the establishing of conditions that they think fair, and they ask them to come out on a strike necessarily for the purpose of thus withholding labor from the employer and forcing him to recognize the union or to unionize his mines or shop, but under that decision if we do it it is a very different thing from publishing a speech; and I would like to ask you, Senator, what, after an injunction of that kind has been granted, after it has been illuminated by this decision of the circuit court of appeals, and a review of it denied by the Supreme

Court of the United States, what you could say to your clients were they mine workers, if they asked you what further efforts they could make to organize this pool of nonunion labor. I say they have been insulated against any attempt, any fair attempt, any real effective attempt on the part of the union to organize them by fair reasoning or persuasion.

Now we come over to Ohio. This situation is spreading like leprosy all over the country and these yellow-dog contracts are now being invoked, that the miners have been familiar with for years, are now being utilized in other trades.

When we come over to Ohio, we find a yellow-dog contract which had advanced a little further. I imagine that this proposition will be familiar to the committee, although it is a new one to us.

In Ohio, profiting no doubt by the effectiveness of the yellow-dog contract as used in West Virginia, and its potentiality when backed by a Federal injunction; in Ohio they have adopted that yellow-dog contract and then borrowed something that looks to me like it is borrowed from the street railroad case in Indianapolis that has been before the committee, I notice from the papers.

They provide about not joining the union, etc., and then they tie up their employee—look at that contract—then they tie up their employee with a proposition of this kind [reading]:

> That he will not at any time take any action designed or tending to place said mine or any other mine owned, leased, or operated by the employer upon the closed union-shop basis, and that he will not at any time foment, advocate, or take any part in any strike of employers' employees.

I suppose they would say to you that he has the right to quit work and that is all. He certainly has no right to quit work conjointly with some one else after talking it over, because he himself would be guilty of a conspiracy to foment a strike. About the only thing he has left is his right individually to lay down his tools and quit. He certainly has not the right to even call together a group of his miserable, underfed, police-guarded, fellow workers, and agitate the question of striking in common, independent of any action on the part of the craft organization.

Let me show you how that is protected. In this injunction pickets are provided, that a picket can do this——

Senator NORRIS (interposing). What injunction is that?

Mr. WARRUM. The injunction in the Clarkson Coal Mining Co. case, secured last September, issued by Benson W. Hough of the southern district of Ohio, eastern division, the title of the case being Clarkson Coal Co. *v.* United Mine Workers of America. Now I say, in passing, Senator, that in this case the original companies that brought this bill were all nonresidents of Ohio, and of course it came into court on diversity of citizenship, but after that a great many of the Ohio companies come in on the ground that they were entitled to intervene regardless of their residence, and under the theory of the Red Jacket Consolidated cases, and they came and got the benefit of the same injunction. It was extended to them. [Reading:]

> Pickets on duty at their respective posts may peacefully observe, communicate with, and persuade persons, but shall not make use of abusive or threatening language. The peaceful persuasion herein referred to is peaceful persuasion directed toward one who is not known to be an employee, in the effort to keep

him from becoming an employee, or directed toward one who is an employee, in the effort to induce him to terminate his relation of employment upon the expiration of any employment contract he may be under, but does not include peaceful persuading one to break an existing employment contract.

They bring a gang of men in there and the picket says: "We want to talk to you about the strike." The guards in charge of them and the deputy marshal, as you see from a further consideration of this decree say, "These men are under contract." Well, I suppose they are. They intend to put them under contract and the chances are they put them under contract when they hired them at the recruiting agencies in Wheeling or Pittsburgh, but they are under contract and we can not talk to them until their contract expires. We have no right to persuade them.

Mr. WARRUM. I should like to read an interview that I suppose is accurate, wherein the judge explains the injunction in the Ohio strike. This is by Judge B. W. Hough, of the United States court. [Reading:]

The reason why the injunctions issued on the appeal of the operators in the Ohio soft-coal strike district read more like the orders of an army of occupation than they do the conclusions of a civil jurist seem understandable after one has had contact with Federal Judge Benson W. Hough, of the southern Ohio district, who signed them.

Judge Hough, tall and straight, inclines more to sword, belt, and spurs in appearance than he does to judicial robes and calf-bound books. One can tell by his conversation that he would rather be a soldier than a judge any day. As a matter of fact, he has risen high in both callings. Aside from his Federal post, he is major general commanding the Ohio National Guard, has served with distinction in the World War, and has donned a uniform several times for the purpose of quelling coal strikes during the last 30 years.

TWO VIEWS OF INJUNCTIONS

"The Big Stick, published in the form of regulations," is the description, in his own words, given by Judge Hough to-day to the preliminary injunction which he granted on February 4, and which was described by one leader of the striking union miners as a document "which jails a man if he coughs, spits, or chews."

It regulates the language to be employed in "peacefully persuading" the strike breakers, puts union pickets in the position of guard mounts who report to the United States marshal as officer of the day, and according to the union, effectively prevents any contact between the miners and the strike breakers.

CERTAIN WORDS FORBIDDEN

Judge Hough was queried first regarding his interdiction of the words "scab," "rat," and "yellow dog." He was told that the union read the injunction as implying a jail sentence should a miner be heard using any of the three appellations.

There are "certain common expressions in the vocabulary of miners on strike," he replied. "They have a perfect right to use them when mixed up in ordinary conversation. In the form of a threat or as preparatory to an assault, it is not permitted."

"Who is going to tell the difference?" he was asked.

"I am," said Judge Hough.

ULTIMATE GOOD SEEN

If the union miners read the ruling as actually forbidding the expressions, Judge Hough sees only ultimate good in that phase.

"It's a fine thing for law and order to have folks watching carefully so they don't stub their toes," he explained.

On the matter of "peaceful persuasion," as defined in the injunction, Judge Hough inclined to the views of C. J. Albasin, representative of the operators in the Ohio strike district. Mr. Albasin had said that many things happened which were grounds for arrest on the fact of the injunction but which were ignored by the Federal and company officers unless they actually threatened a breach of the peace.

VIEWS ON CONTACT PHASE

For instance, "peacefully persuading one to break an existing contract" is contempt of court. The strikers, contending that all strike breakers are under existing contracts, believe that this prevents them from any contact.

"If the operator has entered into a solemn contract," explained Judge Hough, "the United States Supreme Court has held that nobody has the right to get the man to violate that contract. But certainly the miner has the right to plead and urge the other fellow to join the union, but only after the expiration of the existing contract.

"We have to make these things doubly secure in order to get results. I hope you noticed that I specified that only American citizens should be used as pickets. I don't want men in there who can't talk English. What kind of a system of regulation do you think we would have with those sort of people around?"

KEEP PERSONAL LIBERTY

Judge Hough emphasized his contention that there was no abrogation of personal liberty in any of the injunctions he has granted.

"Now, relief was needed in this matter," he declared, "and when you are going to give relief it's got to be described in rhetoric, so that it means something."

"These injunctions are plain enough if they are to be followed literally," he was told.

"Certainly," agreed Judge Hough, "you've got to make it sense in order to get results. Here was this union that said to the strike breakers. 'We won't let you go to work.' In past strike there has been assembly, riot, and killing, and the governor has been called on to preserve peace. We hadn't had that, despite reports. The injunction has done it. They got it and then let down."

SAYS STRIKERS WATCH STEP

"You mean it was not, in practice, as drastic as it sounds?" he was asked.

"No," he replied, "but it's there and they read it and they watch their steps."

He was told that he seemed to be handling the matter more as a soldier than as a judge.

"That's just what it calls for," he replied. "I know all about these things. I've been in every coal strike for 30 years and in every rank from captain to colonel. Put the teeth in the order, have them understand it thoroughly and then, as things go along nicely, give them all the liberality possible under the order. But always have your regulations to fall back on in case things don't go so nicely."

EXPLAINS EVICTIONS

In the matter of evictions ordered into effect for April 1, Judge Hough said that the houses he had named were absolutely needed by their owners—the coal companies—for strike breakers. Only in such proven instances had he granted the appeals, and he pointed out that in one mine camp he had refused to order evictions because it did not seem to him that the houses were absolutely required by the company.

"Conditions are rather terrible," he concluded. "That's in ordinary comfort and food. The State is helping all it can by getting clothes, food, and shoes for children only. You know to feed adults would be taking sides in a labor controversy. Kitchens have been opened under National Guard details and these are the only soldiers in the strike section. They are feeding all who are under sixteen."

The decrees in the Bittner case and the Red Jacket case read as follows:

United States Circuit Court of Appeals. Fourth Circuit. No. 2409. Van A. Bittner, William Roy, Frank Ledvinka, John Cinque, William T. Roberts, and Joseph Angelo, appellants *v.* West Virginia-Pittsburgh Coal Co., a corporation, appellee. Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling. (Argued October 22, 1925. Decided October 29, 1926.) Before Waddill, Rose, and Parker, Circuit Judges. This is an appeal from an order of the 2d of June, 1925, granting a modified injunction, and refusing to dissolve the injunction so modified.

The bill of complaint was filed on the 11th of May, 1925, by the West Virginia Pittsburgh Coal Co., a corporation, the appellee herein, against a number of individuals as such and as officers of the United Mine Workers of America, and various subbranches of that organization. Service of process was had upon the appellants, Van A. Bittner, William Roy, Frank Ledvinka, John Cinque, William T. Roberts, and Joseph Angelo.

The bill sets forth various properties of the complainant company, the nature and character of its business, viz, mining and producing coal; that the Lewis Findley Coal Co., complainant's predecessor and owner of these properties, had run the mines on a nonunion basis, and that each miner employed by said company entered into a contract whereby it was mutually agreed that the said mines should be nonunion mines, and that said employee should not join or become in any way affiliated with any union of coal miners while in such employment. That after complainant acquired said properties this condition was continued. The bill stated in considerable detail various efforts of the United Mine Workers of America to unionize the mines of the complainant, and sundry acts of intimidation and violence were specified. The bill also alleged that from the year 1917 until the 2d of January, 1922, it operated its mines on a union basis; that from January 2, 1922, they were operated on a nonunion basis. That upon complainant's attempting to operate the mines on a nonunion basis in January, 1922, a vigorous effort was made by the United Mine Workers of America to unionize the mines. Resort was had to threats, intimidation, force, violence, assault, beating, and shooting of the employees of the complainant, as well as the wanton destruction of complainant's property.

Complainant caused to be instituted contempt proceedings to prevent interference with the use and operation of the mines under the injunction theretofore awarded against the United Mine Workers of America, and as a result of this action, by understanding of the parties, the interruption in the use of complainant's property was for a while and until about the first of March, 1925, discontinued. The complainant further alleged that on or about the first of March, 1925, the defendants as individuals and as officers of the United Mine Workers of America and the various subdivisions thereof, did combine, conspire, and confederate together for the purpose of unionizing all of the nonunion mines in Northern West Virginia, including the mines of the complainant, and during the month of April, and to the date of filing complainant's bill on the 11th of May, 1925, did induce, entice, and persuade a great number of complainant's employees to break their contracts of service and cease working for the complainant, and agree to join the United Mine Workers of America; that said defendants then well knew that the mines of complainant from January, 1922, had been operated as nonunion mines, and that complainant's employees were working under contracts of service, a copy of one of which contracts is set forth in paragraph 5 of the bill.

In paragraphs 9 to 26, inclusive, of said bill are set forth the various efforts and acts alleged to have been instigated and done by the defendants for the purpose of unionizing complainant's mines. Many of these acts consisted in picketing complainant's premises; in intercepting complainant's employees on their way to work, and inducing them not to work; in intercepting others who were seeking employment with the complainant and inducing them not to work or not to seek employment with the complainant; the circulating and posting up of inflammatory statements and posters; the gathering of large numbers at the mines and openings of the complainant's coal mines, and making various demonstratios; all calculated to intimidate the employees of the complainant.

In paragraph 27 of the bill complainant charges that the defendants resorted to deceit in the furtherance of their plan to unionize their mines by means of inducement, entreaty, persuasion, threats, menaces, and intimidation, inducing some 200 of complainant's employees to absent themselves from work and join a local union when formed, of the United Mine Workers of America; that the names of the employees thus persuaded were kept secret from complainant, and that this action on the part of the defendants occurred at its Gilcrest mines and its Locust Grove mines with the result as charged in paragraph 28, 29, 30, and 31 of complainant's bill, that its employees, who were on the 1st of April, 1925, satisfied and contented with their contracts with the complainant, were terrorized by apprehension of strikes, resulting in force, violence, shooting, and rioting, and destruction of property, and complainant's Locust Grove mines were forced to procure coal from other sources to complete its contracts with its customers. That at this time complainant was paying wages to its employees higher than those paid union labor. That during this entire period of March, April, and May, covering the efforts of the defendants to unionize complainant's mines, the defendants knew of the contractual relations existing between the complainant and its employees. Complainant thereupon, in its bill, prayed for eight specific grounds of relief, and for general relief.

On the 16th of May the defendants tendered a written motion to dismiss the bill, and on that day the case came on to be heard on the complainant's prayer for a preliminary injunction and the defendant's motion to dismiss, which latter motion the defendant first made, and asked leave to withdraw its motion and subsequently renew it; and the cause was duly submitted upon the matters arising on complainant's motion for a preliminary injunction, and the application to dismiss as aforesaid.

On the 19th of May, 1925, the court awarded the preliminary injunction which injunction contained seven paragraphs, as follows:

"1. From interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing plaintiff's mines without its consent, by representing or causing to be represented to any of plaintiff's employees, or to any person who might become an employee of plaintiff, that such person will suffer or is likely to suffer some loss or trouble in continuing in or entering the employment of the plaintiff, by reason of plaintiff not recognizing the union, or because plaintiff runs a nonunion mine.

"2. From interfering or attempting to interfere with plaintiff's employees for the purpose of unionizing the mines without the plaintiff's consent, and in aid of such purpose knowingly and willfully bringing about the breaking by plaintiff's employees of contracts of service known at the time to exist with plaintiff's present and future employees.

"3. From knowingly and willfully enticing plaintiff's employees, present or future, to leave plaintiff's service on the ground that the plaintiff does not recognize the United Mine Workers of America or runs a nonunion mine.

"4. From interfering or attempting to interfere with plaintiff's employees so as to knowingly and willfully bring about the breaking by plaintiff's employees, present and future, of their contracts of service known to the defendants to exist, and especially from knowingly and willfully enticing such employees, present or future, to leave plaintiff's service without plaintiff's consent.

"5. From trespassing on or entering upon the grounds and premises of plaintiff or its mines for the purpose of interfering therewith or hindering or obstructing its business, or with the purpose of compelling or inducing, by threats, intimidation, violent or abusive language, or persuasion, any of plaintiff's employees to refuse or fail to perform their duties as such;

"6. From compelling or inducing or attempting to compel or induce, by threats, intimidation, or abusive or violent language, any of plaintiff's employees to leave its service, or fail or refuse to perform their duties as such employees, or compelling or attempting to compel by like means any person desiring to seek employment in plaintiff's mines and works from so accepting employment therein;

"7. From picketing the streets, roads, or other avenues of approach to plaintiff's mines for the purpose of enticing, entreating, persuading, or by any means inducing plaintiff's employees to break their contracts of service known to them at the time to exist; from approaching plaintiff's employees, present or future, at their places of residence or at any other place for the purpose, of enticing, entreating, persuading, or by any means inducing said employees to break their contracts of service known to them at the time to exist; from advertising meetings or by any means inducing plaintiff's employees to attend

meetings at which attempts shall be made by entreaty, enticement, or persuasion to induce plaintiff's employees to break their contracts of service then known to them to exist; and from doing the like for the purpose of unionizing plaintiff's mines."

On the same day, May 19, the defendant filed a written motion to dissolve the injunction, which motion was heard on June 1, the defendants having meantime, on May 22 filed their answer to the bill; and on June 2 the district court filed its opinion denying the motion to dissolve, and entered its decree modifying the preliminary injunction by omitting the seventh paragraph thereof as aforesaid.

Waddill, circuit judge, after stating the facts as above:

"The sequence of the various steps in the suits are (1) filing of the bill of May 11, 1925; (2) motion to dismiss made May 15, 1925; (3) awarding the preliminary injunction on May 19, 1925; (4) motion to dissolve the preliminary injunction on May 19, 1925; (5) answer of the defendants filed May 22, 1925; and (6) the action of the court on the motion to dissolve the injunction, and entering the decree denying the same, filed June 2, 1925.

"Four grounds are assigned and especially insisted upon for reversing the decree of the district court, namely, first, that under the doctrine of res adjudicata the complainant is not entitled as against the defendants to the relief prayed for in the bill; second, that the court is without jurisdiction to afford the relief sought; third, that the decree asked for would be violative of the law; and fourth, that the granting of the same would create an unconscionable situation whereby the United Mine Workers of America would be entirely denied the right of having their side of the controversy heard.

"The doctrine of res adjudicata sought to be invoked is predicated alone upon the fact that heretofore the litigation in question has been fully heard and determined adversely to the complainant, and that the same can not be reopened and heard anew in this proceeding. Briefly, the defendant's position is that on the 2d of December, 1913, complainant in its bill in equity against John P. White and the defendant, Van A. Bittner, and others, procured an injunction seeking to secure relief of the character herein asked, which injunction, however, was modified pursuant to a decree of the circuit court of appeals for this circuit on the 3d day of July, 1914, and on the 10th day of July, 1923, the injunction in its modified form was made permanent, and that in addition a contempt proceeding was duly instituted by the complainant in that cause seeking to secure the benefits of the injunction proceeding.

"The contempt proceedings in this cause were dismissed, and the original injunction as modified by the circuit court of appeals was attempted to be inforced; but upon consideration of the application herein for injunction, and in the light of the disposition of the contempt proceedings favorably to the defendants, the temporary injunction of the 19th of May, 1925, was modified by the omission of the seventh paragraph thereof, which resulted, in effect, in the reinstatement of the original injunction of the 2d of December, 1913.

"This whole theory of the doctrine of res adjudicata as applicable to the present case is predicated upon the fact that what was done in the first case was dependent upon the same facts as those here involved. This is by no means true. The cases depend entirely upon a different state of facts, though they refer to the same general subject matter

"The first original injunction suit against White and Van Bittner involved many of the legal questions that arise here, and the dismissal of the defendants in the contempt proceeding was because it was held that they had not violated the injunction order in the first case. But further than that what was done either in equity or under the contempt proceeding should not control in the determination of the action to be taken here. More than 12 years have elapsed since the suit in the White case was instituted, since which time—certainly for the period covering from 1917 to the 2d of January, 1922, some five years afterwards—the complainant's mines were operated on the union basis, and hence the facts controlling this situation depend upon what occurred on and after the 1st of March, 1925—indeed, if not since 1922—when complainant again attempted to operate its mines as nonunion mines.

The facts as to what occurred in reference to the original injunctions have no material bearing here. On the contrary, the condition prevailing and what occurred after the effort to operate the complainant's mines upon the original plan of nonunion mines should control. The authorities are quite clear, as to this question, and the effect of new litigation of this character, and when it

is sought to use or avail of what occurred in the first suit as an estoppel in the new, it is entirely manifest that in such cases we must necessarily determine what was the cause actually litigated and determined in the original suit.

"'If it is doubtful whether a second suit is for the same cause of action as the first, it has been said to be a proper test to consider whether the same evidence would sustain both. If the same evidence would sustain both, the two actions are considered the same, and the judgment in the former is a bar to the subsequent action, although the two actions are different in form. If, however, different proofs would be required to sustain the two actions, a judgment in one is no bar to the other. It has been said that this method is the best and most accurate test as to whether a former judgment is a bar in subsequent proceedings between the same parties, and it has even been designated as infallible. Sometime the rule is stated in the form that the test of the identity of causes of action for the purpose of determining the question of res judicata is the identity of the facts essential to their maintenance.' (15 R. C. L. Topic Judgments, sec. 439.)

"'Where, however, the second action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefor, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action. In order that a judgment may operate as a bar to the prosecution of a second action and conclude parties and privies as to all matters which might have been litigated in the first action, there must be identity of the subject matter of the suit, of the cause of action, of the persons and parties, and of the capacity, in which the parties appear as litigants, or, as it is sometimes expressed, identity of the quality in the persons for or against whom the claim is made.' (15 R. C. L. sup. sec. 429.)

"'It is not the mere recovery in a prior action that constitutes the bar or estoppel, but the decision upon the merits of the question in dispute between the parties, and in order to be conclusive as an estoppel, or as a bar under the doctrine of res judicata, the general rule is that a judgment must have been rendered on the merits of the case.' (15 R. C. L. sup. sec. 431.)

"'But when after the entry of a judgment subsequent events transpire creating a new legal situation, the judgment may no longer act as an estoppel to prevent a new suit.'" (R. C. L. sup. sec. 437, p. 962.)

The case of Tosh et al. *v.* West Kentucky Coal Co. (252 Fed. 44), a decision of the circuit court of appeals for the sixth circuit will be found of special interest. There, the West Kentucky Coal Co. filed a bill in equity during a strike affecting its employees and its mining business, in an attempt to unionize its mines. In November, 1907, a final decree was entered enjoining the defendants and all others associated with them, and all persons whatsoever who had acquired notice, information, or knowledge of the decree, from in any manner interfering with or molesting, hindering, obstructing, or stopping any of the business of the complainant, or its agents, servants and employees in the operation of its business at any of its mines, or upon any of its property. On the 2d of June, 1917, the coal company instituted contempt proceedings against the defendants, and upon trial by jury they were convicted of contempt of court for violating the injunction, and were sentenced to terms of imprisonment. Upon a writ of error brought to review and reverse the conviction, the court, on page 48, said:

"Does it appear that the conditions existing in 1917, when the alleged violation of the injunction was committed, was in substance the strike of 1907, or that plaintiffs in error were so far associated with, or so far represented, the defendants in the injunctional decree, as to make them amenable to it by reason of their acts in 19 We find nothing in either allegations or proofs indicating that the strike of 1907, or the interference with the business of complainant which formed the basis of the injunction, had continued subsequent to the decree made in that year, or that the conditions existing in 1917 were anything more than a new and independent effort to unionize the mines. The most which can be said is that there was danger of a strike or of serious trouble if agitation was permitted, or interference with the company's employees

tolerated, and that the issue of union or nonunion mine was the same in 1917 as it had been in 1907."

Again, on page 50 of the same case, the court said:

"The conviction of plaintiffs in error by the jury was made to depend solely upon their making the threats or committing the acts of violence charged against them, with knowledge that the employee so threatened or subjected to violence was in the company's service or employment, and with intent to prevent such employee from continuing therein or from performing his services in such employment, as the case may be. If the injunction of 1907 is of its own force applicable to new conditions in 1917, no reason appears why it would not be applicable to conditions 20 years, or even 30 years, after the decee is entered, provided the union which was back of the attempted unionizing of the mines in 1907, out of which the injunction grew, was also back of the new and independent attempt to unionize the mines 20 or 30 years later.

"Under such circumstances the recognition of the power of summary prosecution for contempt, without previous adjudication that the existing conditions are such as to justify injunction, especially where the remedy is sought to be exercised, not through the public officers, but by the employer alone, and primarily on behalf of its private interests, is fraught with great possibilities for oppression."

Paragraph 3 of the syllabus of the said case is as follows:

"A decree in a strike suit enjoining defendants 'and all other persons whatsoever who may have acquired notice, information, or knowledge of this judgment' from interfering by threats, violence, or intimidation with complainant's employees binds persons having notice who, although not parties, were in privity with the defendants, who 10 years later took part in another and unrelated strike as members of the same labor union are not amenable to such decree, although served with notice."

In the present case the injunction decree in the o'd suit was entered in 1923 and had reference to conditions existing then as alleged in the bill of complaint, and the evidence was to prove the then existing conditions. The decree in that case referred to and determined the rights of the parties as of that time, and held that the acts done at that time were in violation of the then rights of the parties. The final decree, it is true, was entered in July, 1923, in the suit brought in 1913, and the 1913 decree could only have been supported by proof of the allegations of the bill filed at that time. Van A. Bittner is the only party to the present suit who was a party to the 1913 suit, and the defendants in this suit, who were officers of the United Mine Workers of America, because of that fact, and not in privity with different individuals who were their predecessors in office in 1913, are not bound by the decree in that suit.

The bill in this case charges that about the 1st of March, 1925, the defendants and each of them did conspire to confederate together for the purpose of unionizing all of the nonunion mines of northern West Virginia, and in furtherance of that conspiracy did, during the month of April, 1925, entreat, entice, and persuade a great number of complainant's employees to break their contracts of service hereinbefore mentioned, they, the defendants, well knowing at the time that complainant's mines were being operated on a nonunion basis and under contract as aforesaid with its employees to that end.

The defendants, it is true, were acquitted in the contempt proceedings instituted against them for alleged violations of the injunction order of 1913. This, however, in no way affects complainant's right to the injunction prayed for, as the alleged contempt related to the old case, and not to this.

Appellants question the jurisdiction of the court to hear and determine the issues raised by the pleadings. Upon what theory this contention can be made successfully is difficult to preceive as it seems manifest that the court is clothed with full power, authority, and jurisdiction, as well of the subject matter as of the parties to the litigation.

The general purpose of the suit is to preserve and protect to complainant its lowful right to use and enjoy its property. It is the undisputed owner of valuable coal properties, particularly the three large coal mining properties described in the bill and located in the State of West Virginia in the northern judicial district of that State. The mines are operated by complainant in the production of coal therefrom, which is sold for use within and without the State, the mines being operated on what is known as the nonunion basis.

The grievances of the complainant as averred, are that the appellants upon whom service of process was duly made, as well individually, as officers and

agents of the United Mine Workers of America, have set about and combined and confederated among themselves and with others to forcibly unionize complainant's mines, which would tend to destroy the value of the same and make impossible the profitable production of coal. That complainant operated its said mines under written contracts with its employees, one of the provisions of which was that they would not while in complainant's employ, join or become members of the United Mine Workers of America without its knowledge; and that, if they did so, they would leave the employ of complainant. That this method of operating its mines, and the rights and benefits accruing to complainant under its contracts of employment with its employees, was a most valuable property right, which enabled it to successfully conduct its business, and particularly to maintain the number of employees necessary to carry on its business, and without which it could not have done so, and to avoid strikes and such incidental interruptions as would result in the practical destruction of its business and property, and its right to use and enjoy the same. That the defendants well knew of complainant's contracts with its employees, and the terms and conditions of the same, and of the value of such contracts; but nevertheless wilfully and maliciously, and with the purpose of and intending to break up and destroy complainant's business, deliberately set about to induce and secretly persuade complainant's employees and workmen to break their contracts by becoming members of the United Mine Workers of America, and keeping that fact away from the knowledge of complaint until, with such numbers, they could undermine and break up the complainant's business, all of which actions and doings were against good conscience and fair dealings.

The right to maintain the suit against appellants is clear. The complainant is a West Virginia corporation, and instituted this suit at its home in that State; and the appellants are citizens of the States of Pennsylvania and Ohio, respectively, and were duly served with process in the State of West Virginia, which gave and conferred upon complainant in the State and district in which it resided, the right to maintain this litigation, certainly against the appellants herein individually, if not in their official capacities, as representing the labor unions to which they belonged, and for which they acted.

This case in its essential feature is practically a counterpart of that of Hitchman Coal & Coke Co. *v.* Mitchell and others (245 U. S. 229). In that case as here, the right of injunction was involved and considered, growing out of an effort to unionize complainant's mines by peaceable and persuasive methods, fraudulently and deceptively practiced, in utter disregard of its rights and interests under the contractual relations with its employees, of which the defendants were fully advised.

In the Hitchman case, supra, at page 250, Justice Pitney, speaking for the court, said:

"That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing nonmembership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experiences of strikes and other interferences while attempting to run union were a sufficient explanation of its resolve to run nonunion, if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of collective bargaining, it is not bargaining, it is not bargaining at all, in any just sense, unless it is voluntary on both sides. The same liberty which enables men to form unions, and through the union to enter into agreements with employers willing to agree, entitles other men to remain independent of the union and other employers to agree with them to employ no man who owes any allegiance or obligation to the union. In the latter case, as in the former, the parties are entitled to be protected by the law in the enjoyment of the benefits of any lawful agreement they may make. This court repeatedly has held that the employer is as free to make nonmembership in a union a condition of employment, as the workingman is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. (Adair *v.* United States, 208 U. S. 161, 174; Coppage *v.* Kansas, 236, U. S. 1, 14.) In the present case, needless to say, there is no act of legislation to which defendants may resort for justification."

And on page 259, the learned judge further said:

"Upon all the facts, we are constrained to hold that the purpose entertained by defendants to bring about a strike at plaintiff's mine in order to compel plaintiff, through fear of financial loss, to consent to the unionization of the mine

as the lesser evil, was an unlawful purpose, and that the methods resorted to by Hughes—the inducing of the employees to unite with the union in an effort to subvert the system of employment at the mine by concerted breaches of the contracts of employment known to be in force there, not to mention misrepresentation, deceptive statements, and threats of pecuniary loss communicated by Hughes to the men—were unlawful and malicious methods, and not to be justified as a fair exercise of the right to increase the membership of the union."

The case of Eagle Glass Manufacturing Co. *v.* Rowe (245 U. S. 275), follows and approves the Hitchman case cited; and it will be found on a fair consideration of the cases of Duplex Printing Co. *v.* Deering (254 U. S. 443), and American Steel Founderies *v.* Tri City Central Council (257 U. S. 184), that there is nothing in either case as contended for that modifies or militates against the views herein taken of the Hitchman case, but on the contrary they sustain fully, so far as under their facts they are applicable to this case, the views we have taken.

In American Founderies *v.* Tri City Central Council, supra (257 U. S. 184), Mr. Chief Justice Taft, speaking for the court, and considering the effect and meaning of the Hitchman case, supra, on page 211 said:

"The counsel for the steel founderies reply on two cases in this court to support their contention. The first is that Hitchman Coal & Coke Co. *v.* Mitchell (245 U. S. 229). The principle followed in the Hitchman case can not be invoked here. There the action was by a coal mining company of West Virginia against the officers of an international labor union and others to enjoin them from carrying out a plan to bring the employees of the complainant company and all the West Virginia mining companies into the international union, so that the union could control, through the union employees, the production and sale of coal in West Virginia in competition with the mines of Ohio and other States. The plan thus projected was carried out in the case of the complainant company by the use of deception and misrepresentation with its non-union employees, by seeking to induce such employees to become members of the union contrary to the express terms of their contract of employment that they would not remain in complainant's employ if union men, after enough such employees had been secretly secured, suddenly to declare a strike against complainant and to leave it in a helpless situation in which it would have to consent to be unionized. This court held that the purpose was not lawful, and that the means were not lawful, and that the defendants were thus engaged in an unlawful conspiracy which should be enjoined. The unlawful and deceitful means used were quite enough to sustain the decision of the court without more."

Our attention has been called to section 20 of the Clayton Act, as bearing upon the subject under consideration, but we are persuaded that that section has little or no application to this case in the light of the interpretation placed thereupon by the Supreme Court in American Founderies Co. *v.* Tri-City Council, supra (257 U. S. 184, 202). At the latter page Mr. Chief Justice Taft, speaking for the court, said:

"It has been determined by this court that the irreparable injury to property or to a property right, in the first paragraph of section 20, includes injury to the business of an employer, and that the second paragraph applies only in cases growing out of a dispute concerning terms or conditions of employment between an employer and employee, or between employers and employees, or between employees, or between persons employed and persons seeking employment, and not to such dispute between an employer and persons who are neither ex-employees nor seeking employment."

Assuming that application for injunction will ordinarily only be resorted to in cases of labor disturbances, because of public disorder or threatened violence, as distinguished from peaceful methods or lawful persuasion, still it can not be believed that in a case like the one under consideration, relief will be denied because the acts complained of are not of the former class.

Where fraud and deception are openly charged in the methods adopted and practices pursued to undermine and destroy the complainant's rights, equity will not fail to afford the fullest relief. What is said by the court in the Hitchman case, supra, can only admit of this meaning. The above quotations from the American Founderies case (257 U. S. 211), supra, giving the Supreme Court's interpretation of the Hitchman case, clearly so indicates, as does the language of the court, at page 210, where the Chief Justice says:

"There are other cases in which the persuasion was accompanied by the intent to secure a breach of contract, or was part of a secondary boycott or had elements of fraud, misrepresentation, or intimidation in it."

Since the decision in the Hitchman case, supra (245 U. S. 228), two circuit courts of appeals have followed, reiterated, and applied the doctrine of that case in its full scope as applicable to cases like the present. (Kinloch Telephone Co. *v.* Local Union No. 2, etc., 275 Fed. 241 (8th C. C. A.); and Montgomery and others *v.* Pacific Electric Ry. Co., 293 Fed. 680 (9th C. C. A.).)

The third and fourth assignments especially insisted upon by appellants, and herein above quoted as reasons for the reversal of the action of the court below, are too general in their nature to call for any special discussion by the court.

This is an appeal from an order granting a temporary injunction and refusing to dissolve the same, and not a decision upon final hearing on the merits of the case. It appears that the court below in the action taken neither violated any rule or equity, nor improperly exercised the discretion reposed in it, and that the evidence entitled the complainant to injunctive relief, and that the action taken, save as hereinafter modified, is free from error. (Meccano *v.* Wanamaker, 253 U. S. 136, 141; Amarillo *v.* Southwestern Tel., etc., Co. (C. C. A. 5th cir.) 253 Fed. 638; National Picture Theaters *v.* Foundation Film Corp. (C. C. A. 2d cir.) 266 Fed. 208; Gassaway *v.* Borderland Corp. (C. C. A. 7th cir.) 278 Fed. 56.)

Defendants criticize the scope of the injunction contending that its effect is to forbid the publishing and circulating of lawful arguments and the making of lawful speeches and advocating membership in the union, in the neighborhood of plaintiff's mines but we do not think that this is the proper construction of the order, which is an exact copy of that which was approved by the Supreme Court of the United States in the Hitchman Coal Co. case, supra. In view of what was said by that court in American Founderies Company *v.* Tri City Council, there can be no doubt as to the right of defendants to use all lawful propaganda to increase their membership. (See Gassaway *v.* Borderland Coal Co., supra.) But that there may be no misunderstanding in the matter, we think that the order should be modified by adding thereto the following provision:

"Provided that nothing herein contained shall be construed to forbid the advocacy of union membership, in public speeches or by the publication or circulation of arguments when such speeches or arguments are free from threats and other devices to intimidate and from attempts to persuade the complainant's employees or any of them to violate their contracts with it."

The decree of the district court will be modified, each side to pay one-half of the costs in this court.

Modified.

In the United States Circuit Court of Appeals, fourth circuit

No. 2492, John L. Lewis, et al., appellants, *v.* Red Jacket Cons. C. & C. Co., appellee.

No. 2493, The International Organization of the U. M. W. of America, et al., appellants, *v.* Borderland Coal Corporation, et al., appellees.

No. 2494, International Organization, United Mine Workers of America, et al., appellants, *v.* Alpha Pocahontas Coal Co., et al., appellees.

No. 2495, Same, appellants, *v.* Aetnae Sewell Smokeless Coal Co., et al., appellees.

No. 2496, Same, appellants, *v.* Dry Branch Coal Co., et al., appellees.

No. 2497, Same, appellants, *v.* Nelson Fuel Co., et al., appellees.

No. 2498, Same, appellants, *v.* Leevale Coal Co., et al., appellees.

No. 2499, Same, appellants, *v.* Seng Creek Coal Co., et al., appellees.

No. 2500, Same, appellants, *v.* Raleigh-Wyoming Coal Co., et al., appellees.

No. 2501, Same, appellants, *v.* Anchor Coal Co., et al., appellees.

No. 2502, Same, appellants, *v.* Sterling Block Coal Co., et al., appellees.

No. 2503, Same, appellants, *v.* Carbon Fuel Co., et al., appellees.

Appeals from the District Court of the United States for the Southern District of West Virginia, at Charleston. (Argued November 19, 1926. Decided April 18, 1927.) Before Waddill, Rose, and Parker, circuit judges.

These are 12 suits instituted by various owners and operators of coal mines in West Virginia, against the international organization, United Mine Workers of America, the district and local unions of that organization in West Virginia, and various of its international, district, and local officers and members, who are named as defendants in the several suits. Complainants are 316 in number, embracing most of the coal companies operating on a nonunion basis in what is known as the southern West Virginia field. The suits are insti-

tuted to restrain interference with business of complainants by the union and its members, on the ground that such interference constitutes a restraint of interstate trade and commerce in violation of the Sherman Act.

The international organization, United Mine Workers of America, is an unincorporated labor organization of the United States and Canada, having a membership of 475,000, or approximately 75 per cent of all persons working in or around coal mines, coal washeries, and coke ovens on the American continent. It is recognized by a large percentage of the mines of the United States, which are known as union mines and are operated on the "closed union shop basis;" that is to say, no laborers are employed in or about such mines who are not members of the union. Complainants operate their mines nonunion on the "closed nonunion shop basis;" that is their employees are notified that the company will not employ union men and accept employment with that understanding, and in the case of most of them the employees have entered into contracts that they will not join the union while remaining in the service of the employer. Complainants operate in what is probably the most important nonunion coal field of the United States. Their combined annual tonnage amounts to over 40,000,000 tons, 90 per cent or more of which is shipped out of West Virginia in interstate commerce. The controversy involved in the several suits is not a controversy between complainants and their employees over wages, hours of labor, or other cause, but is a controversy between them as nonunion operators and the international union, which is seeking to unionize their mines.

The suit of the Red Jacket Coal Co. was instituted September 30, 1920. That company operates in Mingo County, W. Va., in the Williamson-Thacker field, which is and has always been nonunion territory. A strike was declared by the union in this field about July 1, 1920, in an attempt to unionize it, and the suit was instituted to enjoin the union and its officers and members from interfering with the company's employees by violence, threats, intimidation, picketing, and the like, or by procuring them to breach their contracts with plaintiff in the manner enjoined in Hitcham Coal Co. *v.* Mitchell (245 U. S. 229). The suit of the Borderland Coal Co. was instituted September 26, 1921. This company also operates in Mingo County, and it asks injunctive relief, not only in behalf of itself, but also in behalf of 62 other companies operating in the same territory, who were actually made parties to the suit on April 8, 1922. Shortly prior to the institution of the Borderland suit, armed union miners to a number variously estimated at between 5,000 and 7,000 had congregated at Marmet, W. Va., had announced their intention of marching across Logan County and into Mingo County with the avowed purpose of unionizing that field, and had actually engaged in a pitched battle with State officers, as a result whereof martial law had been declared and Federal troops had been sent into the territory to preserve the peace. In this suit practically the same relief is sought as in the Red Jacket suit.

On April 1, 1922, while the strike order of July 1, 1920 in the Williamson-Thacker field was still outstanding and the efforts of the union in that field were being continued, the union called a nation-wide strike because of its failure to reach a basic wage agreement with the union operators of the central competitive field (Illinois, Indiana, Ohio, and Western Pennsylvania). This strike was declared to apply to nonunion as well as to union miners and measures were taken to make it effective throughout the Williamson-Thacker, Winding Gulf, and Greenbrier fields of West Virginia, which had always been nonunion, as well as in the Kanawha and New River fields, where the union had for a time been recognized but where operation had been commenced on the "closed nonunion shop" basis under contracts between the operators and their employees. Violence, threats, intimidation, and interference with contract were resorted to, and nine suits were instituted by the nonunion operators to enjoin the union, its officers, and members from interfering with their employees and the operation of their mines, and asking the same relief as was asked in the Red Jacket and Borderland suits. In each of these suits a number of companies operating in the same general neighborhood joined as complainants, and, as heretofore stated, 62 companies operating in the Williamson-Thacker field joined as complainants in the Borderland suit which had been instituted some time prior thereto.

Temporary injunctions were obtained in all of these suits. In a number of them appeals were taken to this court and the injunctive orders of the District Court were modified. (Keeney et al. *v.* Borderland Coal Corporation et al. 282 Fed. 269; Dwyer *v.* Alpha Pocahontas Coal Co. et al, and four other

cases. 282 Fed. 270; International Organization, United Mine Workers of American et al. *v.* Leevale Coal Co. et al. 285 Fed. 32.)

The general strike of 1922 was settled by the Cleveland wage agreement of August of that year, but the strike was continued against the nonunion operators of West Virginia. Upon the making of the wage agreement, certain companies, which had joined as complainants in some of the bills, entered into wage agreements recognizing the union and withdrew as complainants. On September 18, 1922, a bill was filed in behalf of the Carbon Fuel Co. and a number of others against the defendants in the other cases and the companies who had withdrawn from the suits as complainants, asking not only that the same relief be awarded as was asked in the other suits but also that these companies be enjoined from paying to the United Mine Workers the "check-off" provided for in their contract, that is a certain sum from the wages of each miner employed which the contract provided should be paid to the union. A preliminary injunction was granted which, on appeal, was modified by this court. (International Organization, United Mine Workers of America *v.* Carbon Fuel Co. et al., 288 Fed. 1020.)

On May 21, 1923, the district court entered an order consolidating all 12 of the cases pending; and the defendants having already moved to dismiss the various cases for misjoinder of parties plaintiff, objected to the consolidation and excepted to the order directing same. A great mass of evidence was then taken, which, with the pleadings and affidavits, covers 5,000 pages of the printed record. The district judge, on October 16, 1925, made an extended finding of facts, which was filed as a part of the record in each case, and in each case entered the same final decree, from which the defendants have appealed.

The district judge found, among other things, that defendants had conspired to restrain interstate trade and commerce in coal and that at the time these suits were instituted the United Mine Workers of America, its officers, agents, representatives, and members were attempting "(*a*) unlawfully, maliciously, and unreasonably to induce, incite, and cause the employees of the plaintiffs in said suits, respectively to violate their said contracts of employment with said plaintiffs: (*b*) to compel said employees of said plaintiffs by use of force, intimidation, threats, violence, vile epithets, abusive language, and false and fraudulent statements to cease working for said plaintiffs and to become members of said union; (*c*) to compel the plaintiffs to recognize said international organization, United Mine Workers of America, and to deal with it and operate their mines under closed-shop contracts with it, including the "check-off" provisions, or to close down their mines." He further found that it was a part of the policy and plan of the Union to have members thereof obtain, keep and hold possession of dwelling houses belonging to complainants, which were constructed and maintained by them for the use of their employees as incidental to such employment and were absolutely necessary to the operation of their mines; and that the union was maintaining persons in the wrongful occupation of such houses for the purpose of preventing the houses being used by persons who were willing to work, and for the purpose of harassing complainants' nonunion employees.

Upon these findings a final decree was entered in each case, the effective provisions of which are those approved by this court in the Carbon Fuel case (288 Fed. 1020). By this decree defendants are restrained and enjoined:

"(1) From interfering with the employes of the plaintiffs or with men seeking employment at their mines, by menaces, threats, violence, or injury to them, their persons, families, or property, or abusing them or their families, or by doing them violence in any way or manner whatsoever, or by doing any other act or thing that will interfere with the right of such employees and those seeking employment, to work upon such terms as to them seem proper, unmolested, and from in any manner injuring or destroying the properties of the plaintiffs, or either of them, or from counseling or advising that these plaintiffs should in any way or manner be injured in the conduct and management of their business and in the enjoyment of their property and property rights.

"(2) From trespassing upon the properties of the plaintiffs, or either of them, or by themselves, or in cooperation with others, form inciting, inducing, or persuading the employees of the plaintiffs to break their contract of employment with the plaintiffs.

"(3) From aiding or assisting any other person or persons to commit or attempt to commit any of the acts herein enjoined.

"(4) From aiding or abetting any person or persons to occupy or hold without right, any house or houses or other property of the plaintiffs, or any of them,

by sending money or other assistance to be used by such persons in furtherance of such unlawful occupancy or holding."

The defendants filed 28 assignments of error, which present five principal contentions for consideration by this court: (1) That the evidence does not establish a conspiracy in restraint of interstate trade and commerce in violation of the Sherman Act; (2) that there was misjoinders of parties plaintiff in the several suits and error in the order of consolidation; (3) that the injunctive decree is too broad in that it forbids peaceful persuasion as well as violence and intimidation; (4) that the court should not have enjoined defendants from rendering assistance to persons to enable them to occupy or hold without right houses belonging to complainants; and (5) that those of complainants who had wage agreements with the union were in pari delicto with defendants, and therefore not entitled to relief. The point was made also that the court had no jurisdiction to award an injunction against defendants Lewis, Green, and Murray on the ground that they were not residents of the district, but this point seems to have been properly raised in no case except that of the Leevale Coal Co., and in that case the injunction did not run against these defendants. No direct question is raised by the appeal as to the legality of the "check-off" for, while this matter is referred to in the findings of fact, the payment of the "check-off" is not enjoined by the decree.

Parker, circuit judge (after stating the case as above):

The first question for our consideration is whether the evidence establishes a conspiracy in restraint of interstate trade and commerce in violation of the Sherman Act. This inquiry goes not merely to the propriety of the granting of the injunction, but to the very existence of the power to grant it; for except in the case of the Red Jacket Coal Co., the jurisdiction of the court in all of the cases rests not upon diversity of citizenship, but upon the fact that they arise under the laws of the United States. Complainants ask an injunction under the Clayton Act to prevent injuries threatened in the carrying out of a conspiracy violative of the Sherman Act. Unless, therefore, there is shown a conspiracy violative of the Sherman Act, no case is shown arising under the laws of the United States, and the jurisdiction of the court is at an end.

With the importance of the question in mind, we have given the most careful consideration to the evidence bearing thereon, and we should say in the outset that we do not think that the evidence sustains some of the conclusions which counsel for complainants seek to draw therefrom, or the interpretation they would have us place upon certain of the findings of the learned district judge with regard to this matter. In the first place, we do not think that the international organization, United Mine Workers of America, constitutes of itself an unlawful conspiracy in restraint of interstate trade and commerce because it embraces a large percentage of the mine workers of this country or because its purpose is to extend its membership so as to embrace all of the workers in the mines of the continent. It may be conceded that the purposes of the union, if realized, would affect wages, hours of labor, and living conditions, and that the power of its organization would be used in furtherance of collective bargaining, and that these things would incidentally affect the production and price of coal sold in interstate commerce. And it may be conceded further that by such an extension of membership the union would acquire a great measure of control over the labor involved in coal production. But this does not mean that the organization is unlawful. Section 6 of the Clayton Act (38 Stat. 371), provides:

That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

As pointed out in Duplex Printing Press Co. *v.* Deering et al. (254 U. S. 443), this section does not exempt a labor union or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade, as, in that case, the carrying on of a secondary boycott; but the section does declare the normal objects of labor unions to be legitimate, and forbids their being held to be com-

binations or conspiracies in restraint of trade because they are organized or because of the normal effect of such organization on interstate commerce. As said by the Supreme Court in the case just cited (254 U. S. at 469):

"The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the antitrust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade."

And speaking to the same point in the later case of American Foundries *v.* Tri City Council (257 U. S. 184, 209), the court said:

"Labor unions are recognized by the Clayton Act as legal when instituted for mutual help and lawfully carrying out their legitimate objects. They have long been thus recognized by the courts. They were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share of division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood."

What is said in this case as to the effect of the standard of wages on competition between employers applies in the coal industry, not to a restricted neighborhood, but to the industry as a whole; for in that industry the rate of wages is one of the largest factors in the cost of production and affects not only competition in the immediate neighborhood but that with producers throughout the same trade territory. The union, therefore, is not to be condemned because it seeks to extend its membership throughout the industry. As a matter of fact, it has been before the Supreme Court in a number of cases, and its organization has been recognized by that court as a lawful one. (United Mine Workers *v.* Coronado Coal Co., 259 U. S. 344, 385.) We have no hesitation, therefore, in holding that the defendants are not guilty of a conspiracy in restraint of trade merely because of the extent and general purpose of their organization.

As pointed out in the case of the Duplex Printing Press Co. *v.* Deering, supra, however, when the union turns aside from its normal and legitimate objects and purposes and engages in an actual combination or conspiracy in restraint of trade, it is accountable therefor in the same manner as any other organization; and we think that the evidence adduced in this case justifies the conclusion that the defendants have engaged in an actual combination and conspiracy in restraint of trade in a manner quite foreign to the normal and legitimate objects of the union. In this connection it is not necessary that we consider whether complainants have established a conspiracy between the United Mine Workers and the operators of the central competitive field, or whether the acts of which complaint is made were done in furtherance of such conspiracy; for we think that the evidence sustains the finding of the district judge that a combination or conspiracy existed among the defendants themselves, without regard to participation by the central operators, to restrain and interfere with the interstate business of complainants.

By this we do not mean, of course, that the union was unlawful of itself, but that defendants as officers of the union had combined and conspired to interfere with the production and shipment of coal by nonunion operators of West Virginia, in order to force the unionization of the West Virginia mines and to make effective the strikes declared pursuant to the policy of the union. The presence of this nonunion field in West Virginia has been a hindrance to the union in its every contest with the operators. It has furnished arguments to the operators in wage negotiations, and in time of strike has furnished coal

which has supplied in part the needs of the country and weakened the effect of the strike. Since 1898 the union officials have recognized the importance of unionizing this field, and, with the exception of an interim during the World War, have been engaged in an almost continuous struggle to force its unionization through interference with the business of the nonunion operators. They have called strikes from time to time for this express purpose, and have spent hundreds of thousands of dollars in interfering with their business.

And there can be no question that the strikes called by the union in the nonunion fields of West Virginia in 1920 and 1922, and the campaign of violence and intimidation incident thereto, were merely the carrying out of the plan and policy upon which the defendants had been engaged for a number of years. In May, 1920, at a time when there was no general strike, union organizers were sent into the nonunion Williamson-Thacker field, and in July following a strike was called for the avowed purpose, among other things, of organizing nonunion territory.

The nation-wide strike of 1922 was made applicable to the nonunion field of West Virginia by proclamation of union officials, and representatives of the union began interfering with the employees of nonunion operators for the purpose of forcing the closing down of nonunion mines. When the strike of 1922 was settled by the Cleveland wage agreement the interference with these nonunion operators was continued. The district judge has found that the conspiracy existed and that the acts complained of were done pursuant thereto. We think that these findings are sustained by the evidence; and the rule is well settled that the findings of the trial judge should not be disturbed unless it clearly appears either that he misapprehended the evidence or has gone against the clear weight thereof; or, in other words, unless we are satisfied that his findings were clearly wrong. (Wolf Mineral Process Corporation *v.* Minerals Separation, North American Corporation (C. C. A. 4th), decided this term; McKeithan Lumber Co. *v.* Fidelity Trust Co. (C. C. A. 4th), 223 Fed. 773; U. S. *v.* U. S. Shoe Machinery Co., 247 U. S. 32, 41; Adamson *v.* Gilliland, 242 U. S. 350)

Defendants say, however, and this seems to be their chief contention on this point, that the mining of coal is not interstate commerce and that a conspiracy to interfere with the operation of coal mines is not a conspiracy to restrain or interfere with interstate commerce. In this connection they rely chiefly upon the decisions of the supreme court in the first Coronado case (259 U. S. 344), and in the United Leather Workers *v.* Herkert (265 U. S. 457). But we do not think that either of these decisions is in point. The leather workers case involved a strike by laborers in trunk factories, and it was held that the fact that the trunks, when manufactured, were to be shipped or sold in interstate commerce did not make their production a part thereof.

The Coronado case, it is true, involved the mining of coal; but the court being under the impression that the coal produced by plaintiff amounted to only 5,000 tons a week, held that a conspiracy directed against production of so small an amount could not be said to be a conspiracy to restrain interstate commerce, even though the coal was intended, if produced, for shipment in such commerce. When the Coronado case went to the supreme court the second time, however (268 U. S. 295), the court adverted to this basis of its former decision and stated that upon the second trial it had been shown that the capacity of plaintiff mines was substantially more than 5,000 tons per day. It held that this, with other evidence as to intent, made a case for the jury as to conspiracy to restrain interstate commerce. The court then proceeded to lay down the rule which we think is applicable here, as follows:

"The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce or the price of it in interstate markets, their action is a direct violation of the antitrust act. (United Mine Workers *v.* Coronado Co., 259 U. S. 344, 409; United Leather Workers *v.* Herkert, 265 U. S. 457, 471; Industrial Association *v.* United States, ante, p. 64.) We think there was substantial evidence at the second trial in this case tending to show that the purpose of the destruction of the mines was to stop the production of nonunion coal and prevent its shipment to markets of other States than Arkansas, where it would by competition tend to reduce the price of the commodity, and affect injuriously the maintenance of wages for union labor in competing mines."

We think there can be no question that the case at bar falls within the rule just quoted from the second Coronado decision. Here it appears that the total production of the mines of complainants is in excess of 40,000,000 tons per year, more than 90 per cent of which is shipped in interstate commerce. Interference with the production of these mines as contemplated by defendants would necessarily interfere with interstate commerce in coal to a substantial degree. Moreover, it is perfectly clear that the purpose of defendants in interfering with production was to stop the shipments in interstate commerce. It was only as the coal entered into interstate commerce that it became a factor in the price and affected defendants in their wage negotiations with the union operators. And, in time of strike, it was only as it moved in interstate commerce that it relieved the coal scarcity and interfered with the strike. A conspiracy is in violation of the statute where there exist an intent to restrain interstate trade and commerce and a scheme appropriate for that purpose, even though it does not act directly upon the instrumentalities of commerce. (Loewe *v.* Lawler, 208 U. S. 274; U. S. *v.* Reading Co., 226 U. S. 324; Duplex Printing Press Co. *v.* Deering, 254 U. S. 443; United States *v.* Brims, 47 Sup. Ct. Rep. 169.) And where the necessary result of the things done pursuant to or contemplated by the conspiracy is to restrain trade between the States, the intent is presumed. (United States *v.* Reading Co., supra, at p. 370.) Defendants must be held to "have intended the necessary and direct consequences of their acts, and can not be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result." (U. S. *v.* Patten, 226 U. S. 525, 543; Addyston Pipe & Steel Co. *v.* United States, 175 U. S. 211, 243.)

In the very recent case of U. S. *v.* Brims, cited above, the Supreme Court dealt with an indictment for a conspiracy between manufacturers, contractors, and laborers, pursuant to which the manufacturers and contractors agreed to employ only union carpenters and these in turn agreed not to install nonunion-made mill work. The circuit court of appeals reversed a conviction in the case, saying:

"The restriction was not against the shipment of millwork into Illinois. It was against nonunion-made millwork produced in or out of Illinois."

This decision, however, was reversed in turn by the Supreme Court and the conviction was sustained on the ground that all parties intended that the outside competition should be cut down and interstate commerce thereby impeded. The court said:

"They wished to eliminate the competition of Wisconsin and other nonunion mills, which were paying lower wages and consequently could undersell them. Obviously it would tend to bring about the desired result if a general combination could be secured under which the manufacturers and contractors would employ only union carpenters with the understanding that the latter would refuse to install nonunion-made millwork. And we think there is evidence reasonably tending to show that such a combination was brought about, and that, as intended by all the parties, the so-called outside competition was cut down, and thereby interstate commerce directly and materially impeded."

The Brims case is directly to point. There the conspiracy affected interstate commerce by its effect upon consumption, here by its effect upon production; but in both cases the conspiracy was intended to operate upon matters not directly connected with transportation or sale in interstate commerce, and in boh cases interstate commerce was intended to be affected and was necessarily affected by what was done. We think, therefore, that in the light of this recent decision there can be no doubt that the conspiracy established by the testimony was one in restraint of interstate commerce in violation of the Sherman Act. (See also Bedford Cut Stone Co. et al. *v.* Journeyman Stone Cutters Association of North America et al., decided by the Supreme Court April 11, 1927.)

The next question is whether there was a misjoinder of parties plaintiff in the several suits or error in the order of consolidation. We think not. The contention of defendants is that under the Sherman Act a private individual has no right to injunctive relief to restrain violations thereof; that section 16 of the Clayton Act merely authorizes suits by private parties against threatened loss or damage; that the right thus conferred is the right to protect the private business of the individual business, and that there is no common right whose protection is sought by the suits. But while it is true that the section

sought by the various complainants is the protection of the individual business of each, it by no means follows that there is lacking that common interest in the subject matter of the litigation which justifies joinder under the practice in equity. There is but one conspiracy on the part of defendants, and that conspiracy is directed against the business of complainants as a class, not because of any of the individual characteristics of the various businesses, but because they are operating on the nonunion basis within a certain territory. The acts of interference shown are not sporadic or occasional, but show clearly an organized attempt to interfere with the business of all nonunion operators within that territory. Acts of interference done pursuant to the conspiracy constitute a threat and menace to all other nonunion operators in the territory. The questions involved in all of the cases, therefore, are the same, and the evidence is practically the same. That bearing on the existence of the conspiracy is identical in all of the cases, and that which deals with acts done in carrying out the conspiracy is identical in all of the cases, and that which deals with acts done in carrying out the conspiracy is of the same general character, and is admissible in all of the cases as showing, if not injury, the reasonableness of the apprehension of injury. It would be most unjust for complainants, being the objects of this joint attack made against them jointly, to be denied the right of seeking jointly the protection of the courts; and it would be absurd for the courts to require that there be presented in 316 different cases against the same parties a question which could be determined in a single case.

"Courts of equity have always exercised a sound discretion in determining whether parties are properly joined in a suit. Their object has been to adopt a course which will best promote the due administration of justice without multiplying unnecessary litigation on the one hand or drawing suitors into needless and oppressive expenses and confusing the courts with many issues on the other." (Jones *v.* Rowbotham, 47 N. J. Eq. 337; 19 L. R. A. 663.)

As said by Mr. Justice McLean, in dealing with the same subject in Fitch *v.* Creighton, 24 Howard, 159, 164:

"Every case must be governed by its circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expenses and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts."

In disposing of such an objection to five bills filed by 62 fire insurance companies against the insurance commissioner of the State of California to restrain acts alleged to be illegal, Judge Morrow, in Liverpool & London & Globe Ins. Co. *v.* Clunie (88 Fed. 160, 167), laid down what we conceive to be the correct rule applicable to such cases. He said:

"A court of equity will, in a single suit, take cognizance of a controversy, determine the rights of all the parties, and grant the relief requisite to meet the ends of justice in order to prevent a multiplicity of suits where a number of persons have separate and individual claims and rights of action against the same party but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter may be settled in one action brought by all these persons uniting as coplaintiffs."

Professor Pomeroy, after an exhaustive discussion of the question and of the cases in which it has been considered, says:

"Under the greatest diversity of circumstances and the greatest variety of claims arising from unauthorized public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts, the weight of authority is simply overwhelming that the jurisdiction may and should be exercised either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no common title nor community of right or of interest in the subject matter among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. In a majority of the decided cases this community of interest in the questions at issue and in the kind of relief sought has originated from the fact that the separate claims of all the individuals composing the body arose by means of the same unauthorized, unlawful, or illegal act or proceeding. Even this external feature of

unity, however, has not always existed, and is not deemed essential. Courts of the highest standing and ability have repeatedly interfered and exercised this jurisdiction where the individual claims were not only legally separate but were separate in time and each arose from an entirely separate and distinct transaction, simply because there was a community of interest among all the claimants in the question at issue and in the remedy." (Pomeroy's Equity Jurisprudence, 4th ed., sec. 269.)

(See also Tate *v.* Ohio and Mississippi R. Co., 10 Ind. 174, 71 Am. Dec. 309; Turney *v.* Hart, 71 Mich. 128, 15 Am. St. Rep. 243; First Nat. Bk. of Mt. Vernon *v.* Sarills, 129 Inc. 201, 28 Am. St. Rep. 185, 188; Strobel *v.* Kerr Salt Co., 164 N. Y. 303, 79 Am. St. Rep. 643, 654; Pillsbury Washburn Flour Mills Co. *v.* Eagle (CCA 7th), 86 Fed. 608; R. R. Kitchen & Co. *v.* Local Union, 91 W. Va. 65, 112 S. E. 198; Goldfield Consol. Mines Co. *v.* Richardson et al., 194 Fed. 198, 206; American Smelting & Refining Co. *v.* Godfrey (CCA 8th), 158 Fed. 225; Osborne *v.* Wisconsin Cent. R. Co. (opinion by Justice Harlan), 43 Fed. 824; 20 R. C. L. 676; note 71 Am. Dec. p. 311 et seq.)

Of the cases cited, Kitchen *v.* Local Union, supra, is directly in point. In that case 59 different employers of labor joined in a suit as complainants against 90 defendants embracing 10 labor organizations and their officials, alleging conspiracy on the part of defendants and asking an injunction to restrain them from threatened interference with business of complainants. Defendants demurred to the bill on the ground of misjoinder and multifariousness. In sustaining the bill the Supreme Court of Appeals of West Virginia said:

"In view of the common interest each unit of each group has in the prosecution of his or its business, opposed and affected in common with all the others, by an organized and plenary effort conducted on the part of the defendants, if the allegations are true, by unlawful means, all may unite in one bill to restrain and prevent the use of the unlawful means and methods so employed. If by the use of such methods, directed and applied to the business of each of the plaintiffs, all are prevented from prosecuting their respective enterprises, they are all similarly affected by the same illegal cause, wherefore they may unite in resisting it, and there is no misjoinder of parties plaintiff."

The whole question, we think, is settled, so far as the Federal courts are concerned, by rule 26 of the New Equity Rules, which provides:

"The plaintiff may join in one bill as many causes of action, cognizable in equity, as he may have against the defendant. But when there are more than one plaintiff, the causes of action joined must be joint, and if there be more than one defendant the liability must be one asserted against all of the material defendants, or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice. If it appear that any such causes of action can not be conveniently disposed of together, the court may order separate trials."

It is earnestly contended by defendants, however, that the portion of the rule which we have italicized applies only to the uniting of causes against defendants where there are more than one defendant, and has no application to cases where there are more than one plaintiff, and that in the case of plaintiffs the rule requires that the causes of action joined must be joint. We can not accept this interpretation. The purpose of the equity rules was to liberalize and not restrict the practice in equity, and it certainly could not have been intended to forbid joinder in cases where although the causes of action were not joint, the convenient administration of justice would be promoted and where for years the propriety of such joinder to prevent a multiplicity of suits had been recognized. The clause "or sufficient grounds must appear for uniting the causes of action in order to promote the convenient administration of justice" must, we think, be construed as alternative to the specific provision allowing joinder in the case of more than one plaintiff, as well as to the specific provision allowing joinder in the case of more than one defendant. Rule 26 is not to be construed as prohibitive of anything which was permissible before its adoption. (Low *v.* McMaster, 225 Fed. 235.)

What we have said as to joinder virtually disposes of the exceptions to the order of consolidation. By the act of July 22 (1813 R. S. sec. 921, U. S. C. title 28, sec. 734) it is provided:

"When causes of a like nature or relative to the same questions are pending before a court of the United States, or of any Territory, the court may make such orders and rules concerning proceedings therein as may be conformable

to the usage of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so."

Under this statute there can be no question that the consolidation was a matter resting in the sound discretion of the trial judge, and that under the circumstances of the case the order of consolidation was proper. (Mutual Life Ins. Co. *v.* Hillman, 145 U. S. 285; American Window Glass Co. *v.* Noe (C. C. A. 7th) 158 Fed. 777; Toledo Elec. R. Co. *v.* Continental Trust Co. (C. C. A 6th) 95 Fed. 497.)

In their criticism of the scope of the injunction, defendants make complaint of the restraints contained in paragraphs 2 and 4. As the language criticized is that approved by this court in International Organization, United Mine Workers of America et al., *v.* Carbon Fuel Co. et al. (288 Fed. 1020) we might content ourselves with referring to that decision as the law of the case in the Carbon Fuel case now before us and as binding authority in the other cases; but we shall go further and say that in the light of the decisions of the Supreme Court we have no doubt as to the correctness of the paragraphs criticized.

With respect to the second paragraph, complaint is made that it restrains defendants "from inciting, inducing, or persuading the employees of plaintiffs to break their contract of employment with plaintiff." This language is certainly not so broad as that of the decree approved by the Supreme Court in Hitchman Coal & Coke Co. *v.* Mitchell (245 U. S. 229, 261), which also enjoined interference with contract by means of peaceful persuasion. The doctrine of that case has been approved by the Supreme Court in the later cases of the American Steel Foundaries *v.* Tri-City Central Trades Council (257 U. S. 184), United Mine Workers *v.* Coronado Coal Co. (259 U. S. 344), and applied by this court in Bittner *v.* West Virginia-Pennsylvania Coal Co. (15 Fed. (2) 652), by the Circuit Court of Appeals of the Eighth Circuit in Kinloch Telephone Co. *v.* Local Union (275 Fed. 241), and by the Circuit Court of Appeals of the Ninth Circuit in Montgomery *v.* Pacific Electric Ry. Co. (293 Fed. 680).

It is said, however, that the effect of the decree, which, of course, operates indefinitely in futuro, is to restrain defendants from attempting to extend their membership among the employees of complainants who are under contract not to join the union while remaining in complainants' service, and to forbid the publishing and circulating of lawful arguments and the making of lawful and proper speeches advocating such union membership. They say that the effect of the decree, therefore, is that, because complainants' employees have agreed to work on the nonunion basis, defendants are forbidden, for an indefinite period in the future, to lay before them any lawful and proper argument in favor of union membership.

If we so understood the decree, we would not hesitate to modify it. As we said in the Bittner case, there can be no doubt of the right of defendants to use all lawful propaganda to increase their membership. On the other hand, however, this right must be exercised with due regard to the rights of complainants. To make a speech or to circulate an argument under ordinary circumstances dwelling upon the advantages of union membership, is one thing. To approach a company's employees, working under a contract not to join the union while remaining in the company's service, and induce them in violation of their contracts to join the union and go on a strike for the purpose of forcing the company to recognize the union or of impairing its power of production, is another and very different thing. What the decree forbids is this "inciting, inducing, or persuading the employees of plaintiff to break their contracts of employment"; and what was said in the Hitchman case with respect to this matter is conclusive of the point involved here. The court there said:

"But the facts rendered it plain that what the defendants were endeavoring to do at the Hitchman mine and neighboring mines can not be treated as a bona fide effort to enlarge the membership of the union. There is no evidence to show, nor can it be inferred, that defendants intended or desired to have the men at these mines join the union unless they could organize the mines. Without this, the new members would be added to the number of men competing for jobs in the organized districts, while nonunion men would take their places in the Panhandle mines. Except as a means to the end of compelling the owners of these mines to change their method of operation, the defendants were not seeking to enlarge the union membership. * * * Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are 'peaceable'—that is, if they stop short

of physical violence, or coercion through fear of it. In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employees constitutes such a violation."

The inhibition of section 20 of the Clayton Act against enjoining peaceful persuasion does not apply, as this is not a case growing out of a dispute concerning terms or conditions of employment, between an employer and employee, between employers and employees, or between employees, or between persons employed and persons seeking employment; but is a case growing out of a dispute between employers and persons who are neither exemployees nor seeking employment. In such cases, section 20 of the Clayton Act has no application. (American Foundries *v.* Tri-City Council, 257 U. S. 184, 202; Duplex Printing Press Co. *v.* Deering, 254 U. S. 443, 471; Bittner *v.* West Virginia-Pittsburgh Coal Co. (C. C. A. 4th) 15th Fed. (2d) 652, 658.)

The principal criticism of paragraph 4 of the decree is that it violates paragraph 20 of the Clayton Act, but, as we have seen above, that section has no application to a case such as this. We see no other reason why paragraph 4 of the decree is not proper. Under the law of West Virginia, when the employees of complainants quit work and refuse to surrender the houses of complainants occupied by them they become trespassers on complainants' property. (Angel *v.* Black Band Consol. Coal Co., 96 W. Va. 47, 122 S. E. 274.) The effect of the fourth paragraph of the decree is to enjoin defendants from aiding and abetting such persons in occupying or holding without right houses belonging to complainants, or, in other words, from aiding and abetting in trespasses committed on complainants' property in furtherance of the design of the conspiracy. It is clear that no more effective way of shutting down the mines could be devised than to get the houses of the mine villages in possession of persons who refuse to work in the mines and withhold possession of the houses from persons who are willing to work.

The basis of the contention that certain of the complainants are in pari delicto with the defendants and, therefore, not entitled to relief, as we understand the contention, is that those complainants operated on the union basis for a number of years and paid the "check off" to the union. This contention assumes two propositions, (1) that the check off is illegal and in furtherance of the conspiracy, and (2) that, once having been parties to the conspiracy, complainants can not withdraw therefrom and be protected against it when it is directed against them. Without following this argument into all of its ramifications, it is sufficient to say that we see nothing to connect these complainants with the conspiracy except their payment of the check off, and we see nothing of itself illegal in the check off nor do we think that, by agreeing to the check off, they became parties to the conspiracy of defendants. As said in Gassaway *v.* Borderland Coal Co. (C. C. A. 7th), 278 Fed. 56, 65:

"So far as the contracts themselves and this record disclose, the check off is the voluntary assignment by the employee of so much of his wages as may be necessary to meet his union dues, and his direction to his employer to pay the amount to the treasurer of his union. In that aspect the contract provision is legal, and quite evidently there are many lawful purposes for which dues may be used."

It follows that, while we do not approve of all of the findings of fact made by the district court, we think that the decree entered in the several cases was sustained by the evidence and same is accordingly affirmed.

Affirmed.

(These cases were herd by the three circuit judges. The late Judge Rose concurred in the decision that the decree of the district court should be affirmed. He expressed a desire, however, to examine the record with a view of satisfying himself whether jurisdiction existed as to the defendants Lewis, Green, and Murray. He died before the opinion could be submitted to him.)

Reading further from the decree in the Clarkson case:

The marshal for the southern district of Ohio is directed to see that this injunction is enforced within the limits of said district, and to arrest and cause to be arrested any person or persons caught in the act of disobeying any of the provisions of this injunction.

I have always thought that only the judge issuing the injunction could determine who was guilty of its violation. The earlier practice required him to issue a rule on the defendant to show cause why he should not be arrested, but in any event it is up to him to take the information of the affidavit and read it and decide whether a man is contumacious of his decree. [Reading:]

> And cause to be arrested any person or persons caught in the act of disobeying any of the provisions of this injunction, and to bring such person or persons forthwith before the United States Commissioner or the court, and to report to the court each such other acts of disobedience of this order as may otherwise come to his attention. The marshal is authorized and directed to call to his assistance such persons, either as deputy marshals or otherwise, with compensation allowed by law, as he may deem necessary.

And so forth. I have read enough to suggest to you the machinery that has been adopted by this court.

In none of these cases am I criticizing the law. I am here to say that the law has developed into a state or a body that calls for some action by the corrective end of the law making body. It is not a criticism of the court. I have no doubt but what Judge Hough felt himself caught within the coil, the miserable coil of this equity jurisdiction that has developed in labor cases, and perhaps it was that having his authority invoked to put his judicial hand between union labor and the pool of nonunion labor——

Senator NORRIS (interposing). I do not understand why you or anybody else should not in a respectful way criticize the court. They are only human beings, these judges. Would this court have failed to do his duty if he had refused to issue an injunction restraining somebody from advising one of those employees to quit his employment before his contract had expired? He did not have to do that, did he? He did not have to issue an injunction which said you can not even advise one of these employees to quit until his contract is over.

Mr. WARRUM. No; I do not think he did. I do not believe—I have constantly argued there was no authority for it that is in the two decisions of the Supreme Court of the United States, the Hitchman case plus the Foundries case. I do not believe that the law imposed upon him a duty at the application of an employer to issue an injunction of that kind.

Senator NORRIS. I think it is the first injunction to which our attention has been called where there has been such a drastic statement. I can not help but think that that injunction would have prevented anybody from advising one of those employees to quit.

Mr. WARRUM. Well, the situation——

Senator NORRIS (interposing). Suppose he had consulted you about this contract as a lawyer, and you believed as a lawyer that the contract was not enforceable, would you have had any right to tell him so if you had happened to be an employee of the company or an officer of the union?

Mr. WARRUM. Would I have had the right to do it?

Senator NORRIS. Yes.

Mr. WARRUM. Well, I suppose in an abstract way I would have the right, but you understand, Senator, you understand very well from the contempt proceedings that I have shown you, pending before

these other courts, and from the very text of the decision issued by Judge Hough, that I would do it at the peril of going to jail, would I not?

Senator NORRIS. I should think so.

Mr. WARRUM. Yes.

Senator NORRIS. Is that so sacred there that nobody can criticize——

Mr. WARRUM (interposing). We criticized it before it was issued, and we are criticizing it here just as much as we can, and we do feel that our criticism is protected and is justified and is due the committee now.

What I started to say a moment ago was I feel these judges themselves are to a certain extent caught in the coils of a law developed around labor disputes——

Senator NORRIS (interposing). I can not see any coil this judge was in when he issued that kind of a restraining order. I do not understand how it could be claimed that he was compelled to issue that order and say that this man or that some other person who was an officer of the union, although he might have been an attorney of good standing, would not dare advise a client, if he was a member of the union, also, that he ought to quit or that his contract was not legal. Where would that lead us if we followed that kind of a procedure? Now, there are a good many people—there may be two sides to it—there are a good many people who think that contract is void.

Mr. WARRUM. Well, they are being protected continually by Federal injunctions.

Senator NORRIS. And that a laboring man can not make a contract by which he will stay in the employ of anybody for a specific length of time without he has the right to violate it the next day if he wants to. The other contention would mean involuntary servitude.

Mr. WARRUM. I think it is intended to create a condition of peonage.

Senator NORRIS. From my experience in the law, where there were continually lawsuits arising between men who had employed others to do work, where they had quit, and did not complete their contract, one side claiming they had a right to and another one, as far as I know, never claiming they had a right to, an injunction preventing them from it, but if they did quit they were liable to damages if they could prove damages.

Mr. WARRUM. I have never understood that there could be a specific performance of a personal-service contract in English law either directly or indirectly by mandatory injunctions or by injunctive processes, but this is what they do.

Let me give you the philosophy, if I can, of the yellow-dog contract, as it has been built out of the Hitchman case, and I think perhaps unfairly, but we realize it is the law, it is the law of these cases. We are affected by it. We have come to the law-making power to get relief on it, and it is the creation of a state of law by something which is not a law-making body, not intended for the protection of property right, but is the determination of human relationship, and we want some relief from it.

Here is the situation: A man gets a contract with his employer on the individual bargain basis and an employee contracting under

those circumstances, as stated by the Supreme Court in the Founderies case, finds himself helpless. He signs whatever it is necessary to be signed. Among other things, he signs away his right to change his status as a member of a labor organization and the court holds that the employer by those contracts has achieved a property right, has secured a property right in the nonunion status of his employee. That is exactly what it amounts to and that he can go into court. He has employed this man on the theory that he is a nonunion man, that he can go into court and secure an injunction that protects him in a conceived property right that he has acquired in the nonunion status of his employee.

Now, if it was any other relationship there would be no difficulty with the courts or with Congress or the legislatures.

I admit that an employer has a right to employ only Democrats, but if, having employed only Democrats or having employed men only on the theory that they would keep them while they were Democrats, he could not go into any court and secure an injunction against Republican orators trying to persuade those Democrats to join the Republican ticket, and it is so with the church. I imagine a man has a right to employ only Methodists, but what would be said if, having so contracted to employ only Methodists, he sought for an injunction that would prevent the Presbyterian elders from laying before him the doctrine of predestination and the 49 points?

Now, they come back and say, "Well, you are using an illustration"—I have had them say it—"that is unconnected with the economic situation that the employer finds himself in."

Then I have used this illustration:

Take the case of bachelors, I do not doubt a man has the right to employ only those who are single men. I understand that there are mines in West Virginia that employ only single men and I can easily conceive, knowing something of the astuteness and ability of counsel that represent the coal producers in these controversies, that they could come before the court and show that there was a positive relation of the marital status of the employee to the economic need of his employer, that he could, for instance, depress the wages of a bachelor easier than he could of a man with a wife and eight or nine children; that he could do, as the testimony before the Commerce Committee has shown, has been done in the Pittsburgh Coal Co., build his bunks like the bunks of a forecastle and pile these bachelors in four deep. I have no doubt but what they could show not merely that he had a right, which anyone will admit, but that he had an interest in that status, but what would be said, Senator, if there was an organization of spinsters and they undertook to convert these bachelors into benedicts and he asked to enjoin them from their nefarious activities in interfering with a contract he had with his men.

Senator NORRIS. That would not be difficult. He would be entitled to an injunction.

Mr. WARRUM. It may be. The trouble is that the courts, encouraged by your suggestion that men might well speak with some freedom, the trouble is that the court, as acutely conscious as a man is of a sore toe, that they are the repository of the power that protects property. If ordinary questions are presented to courts in-

volving personal rights they are dealt with fairly, but if there is a conflict between personal rights and property rights it is my judgment that the personal rights give way before the protection of property rights, and if that is true in any case, it is more acutely true when labor, organized labor, has some cause to present to the court that involves a controversy with so-called property rights.

Why, you take, if the injunctions that were issued by the courts in these labor disputes were limited to preventing trespasses and damage and threatened trespasses and damage, and anticipated trespasses and anticipated damage to physical property, there would have been no feeling aroused against the development of these injunction abuses, but the trouble is they go further and they ask the court to intervene in the economic struggle that is constantly going on between the organized craft outside the palisade and the pool of unorganized labor that he has collected behind the palisade.

They do not ask that his property be respected, or at least they do not stop with that request, but they go on and ask that this labor be insulated. They are constantly coming into court and asking that Smith, Jones, and Brown be protected from intimidation and abuse on the theory that they have a property right in them. That is the attitude and the situation the courts are in, and in doing that they are invoking the power of the court to intervene in a struggle that has been going on and will continue to go on as long as organized labor is recognized as a lawful form of social activity in this country.

It is my theory that whenever they go beyond a request for protection to their property and ask in the character of a parent or a guardian, or something of that character, that they also be given an injunction that protects Smith, Jones, and Brown from the trespass and untoward acts of the union, its members, and officers, that they have, as Justice Brandeis said in the Truax case, invaded the field of social struggle, and as Judge Baker says in the Borderland case, in the seventh circuit, interfered in the free access that both employer and craft organizations ought to have to the pool of unorganized labor, and when they do that they ought to be allowed to have such relief as they ask for in that connection only upon the explicit condition that the court assures to the representatives of the defendant and to organized crafts a free and continuous access to that pool of unorganized labor in order to peaceably persuade and present their fair argument and reasoning in relation to their craft struggle.

Senator NORRIS. The committee will stand adjourned.

(Whereupon, at 12 noon, Friday, March 16, 1928, the hearing was adjourned subject to call.)

LIMITING SCOPE OF INJUNCTIONS IN LABOR DISPUTES

TUESDAY, MARCH 20, 1928

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to call, at 10.30 o'clock a. m., in the committee room, Capitol, Senator George W. Norris presiding.

Present: Senators Norris (chairman), Blaine, and Walsh of Montana).

STATEMENT OF JOHN T. FREY, SECRETARY AND TREASURER OF THE METAL TRADES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR—Resumed

Mr. FREY. Mr. Chairman, this morning I desire to offer a few thoughts in rebuttal of some of the arguments which have been presented by those opposed to the bill; but just before doing that I believe it necessary that something should be said in connection with those colored citizens who came from Cleveland, Ohio, and appeared in opposition to the bill.

From what I read, the basis of their opposition was that the trade-union movement, or some of its parts, refused to take colored men into membership, and that the use of the equity courts to issue injunctions against trade-unions so that they will not be discriminated against was quite necessary. Their argument appears to me rather a dubious one. The fact that they failed to come to the headquarters of the American Federation of Labor for relief when they thought that the unions were discriminating against them was an evidence that they thought it was unnecessary to do so, because they must be aware that there are hundreds of thousands of negro members of trade-unions and that some organizations, the United Mine Workers in particular, have maintained as high as 40 negro organizers at one time, and I believe at present have some 28. I am not positive of the exact number, but it is somewhere in that neighborhood.

To place the position of the American trade-union movement on record, I want to say that the American Federation of Labor, in its convention in 1897, condemned the charge that unions would not admit negroes, and declared that the A. F. of L. reaffirms its declaration that it welcomes into its ranks all labor, without regard to creed, color, sex, race, or nationality, and that its best efforts have been and will continue to be to encourage the organization of those most needing its protection, whether they be in the North or the South, the East or the West, white or black.

That declaration was made by the American Federation of Labor almost at the time of its inception, and the succeeding conventions of the American Federation of Labor have continued to make similar declarations, some of them going to much greater length than this one.

I have had much personal experience with this problem. I went into the Southern States in 1900 to organize, and believing that the economic conditions made organization of the negroes necessary, organized a union of negro molders in the city of Chattanooga in 1901. There were some 300 members. One of our oldest local unions is in Birmingham, Ala. One of our vice presidents, Mr. Nick Smith, a native of the South, lived there most of his life before he became one of our vice presidents.

Some 14 years ago he began to initiate negroes into the local union, where they sat with all of the other members and had all of the privileges and opportunities on equal terms with the other members.

The vital point is this, that unfortunately many leaders of the colored race in this country are opposed to the negro joining trade-unions. Two years ago the editors of negro publications in this country held a national convention and adopted a resolution which was very widely circulated through their press, advising the negroes not to join our unions. The reason was a logical one to them. They believed that it was necessary for the negro to learn something of industry, to become an industrial worker, and that if he did become a member of a trade-union he would find it impossible to secure employment; that his opportunity of learning a trade depended upon the employer being more or less assured that the negro would be subject to his control and free from trade-union influences.

I have had considerable correspondence with leaders of the race, including that great man Booker T. Washington, who, some years before his death, wrote certain articles which were published in the Outlook and other well-known magazines, criticizing the American trade-union movement for having refused to take the negro into membership. I was aware of some of Mr. Washington's problems and his belief that the negro must learn to work in industry in order to remove himself from the soil, as an agriculturist, and that, as a result, several large corporations in the South, through his influence, had given colored men an opportunity of becoming mechanics. Once a year Mr. Washington would visit those corporations and explain to the negroes the great advantages which the corporation was giving to them in enabling them to raise themselves from the hardships of unskilled labor into the classification of mechanics, and he intimated quite broadly that that opportunity, or that debt to the employer, made it necessary that they should continue to enjoy the employer's confidence. His influence was against organizing the negroes.

When Mr. Washington wrote these articles criticizing our movement I corresponded with him and pointed out the unfairness of his attitude; I told him at that time one of my great problems was organizing the negro molders in the South; that if he felt that he could not afford to make a public declaration advising the negroes to join trade-unions when they were requested to, at least he might give me some letter which I could use at the meetings I would attend, giving his approval to the negroes joining our trade-unions. Mr. Washington declined to make either a public statement or to give me the com-

munications that I desired. The unfortunate fact is that, while many of the leaders of the colored race in this country accuse our movement of not permitting negroes to become members, the fact is that they advise the members of the negro race not to join our unions.

I read with considerable interest the testimony of those who appeared in opposition to the bill, particularly that of Mr. Thom, Mr. Merritt, and Mr. Emery. As Mr. Emery seems to occupy the most representative position as counsel for the National Association of Manufacturers, the National Metal Trades Association, and for some 48 other national, State, and local employers' organizations, I thought that because of this representative capacity and his long experience as the attorney for these groups, what he said might have great weight with the committee, and so I desire to examine some of the statements which he made and call attention to some statements which he failed to make, because in some places it is quite evident that his failure to refer to some of the positive statements which were made on our side is an evidence either that he ignored them entirely or that he felt our statements were so truthful and so sound that it was better not to discuss them.

When I had the privilege of appearing before the committee a couple of weeks ago I briefly referred to that long contest between the law courts and the chancellor in England, and stated that as a result of that contest, stretching over several centuries, certain basic rules of equity were finally evolved: One, that equity was only to be used to protect property from irreparable injury when there was no adequate remedy at law; another, that it was not to be used to curtail personal rights; another, that it was not to be used to punish for crime; and another, that those who seek equity must do equity. In other words, the equity court was not the place where the aggressor could some to secure assistance; it was the place where the aggrieved could come to secure the protection of the court.

After having discussed a number of injunctions which have been issued in this country, I made the statement that all of these basic rules of equity had been set aside in our American cases.

I find that Mr. Emery inferred that some of those on our side who had referred to the development of equity had failed to sufficiently quote Blackstone, and so Mr. Emery, quoting from Blackstone, read:

> But this was in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves, partly from their ignorance of law (being frequently bishops or statesmen), partly from ambition and lust for power (encouraged by the arbitrary principles of the age they lived in), but principally from the narrow and unjust decisions of the courts of law, had arrogated to themselves such unlimited authority as has totally been disclaimed by their successors for now above a century past.

It was this disclaiming of the powers formerly exercised by the chancery courts in England which led to the establishment of these basic rules of equity which we have amply indicated, from the decisions of the courts, have all been set aside in the United States when injunctions have been issued during an industrial dispute.

And so Mr. Emery's statement is a corroboration of ours. He has admitted, through indirection, that these basic rules have been set aside in the United States, as we have contended.

Mr. Emery then went into our statement that the use of injunctions in connection with industrial disputes was peculiar to the United

States, and did not exist elsewhere. Mr. Emery made the statement that "It is not borne out by the facts," and added that "The application of the injunction has always been part of English jurisprudence. It has been used in labor disputes in Great Britain in the past."

That is true. In the Springhead Spinning Co. case, the first injunction in a labor dispute was issued. If my memory serves me right, that was in 1867. The principle established in that injunction was set aside later on by the lord counselor in an opinion in the insurance company case.

The second injunction in labor disputes in Great Britain was the famout Taff Vale decision, which lead to action in Parliament, which finally set aside the decision of the House of Lords in the case.

Those are the two English cases.

Senator WALSH. You say those are the only two injunctions in the courts of Great Britain?

Mr. FREY. The only two in connection with labor cases that I know of.

Senator WALSH. What was the occasion for the trades union act?

Mr. FREY. The trade union dispute bill, which, in substance, held that what any one man had a legal right to do two or more had an equal right to do. That what two or more did collectively what they had a right to do individually during an industrial dispute did not constitute an illegal conspiracy. It was the doctrine which we tried to have established in this country, but up to the present time Congress has not seen fit to do so.

Senator WALSH. Is the injunction process entirely unknown on the Continent in labor disputes?

Mr. FREY. Practically unknown. They depend there either on the law or the police force. Property over there is protected by the police force. If there is anything in the nature of large gatherings or mobs or attempts to do violence, instead of endeavoring to restrain them by injunction they endeavor to prevent it by the use of the police force. There are edicts issued in some of the continental countries where democratic institutions hardly exist except in name; but that is not necessarily from the court. That is from the prefect or the governor of the Province, or some high public official, some chief executive.

In connection with the statement which Mr. Emery made that injunctions were issued in England and in other countries, he made some reference to the fact that injunctions had been issued by the courts in Canada in connection with industrial disputes. That is true. That has developed since the war. There were no injunctions in connection with labor disputes before the war in Canada that I know of. In fact, they received no attention. But several have been issued since the war, and in issuing them the courts in Canada have departed absolutely from the practice of the British courts. They have copied what our equity courts have been doing, and we think we understand the reason.

There are some $3,500,000,000 of American capital invested in Canadian industry. The attorneys for those American investors go to Canada very frequently. They consult with the attorneys whom they employ in Canada. They acquaint them with the methods that

they are able to apply in American courts of equity, and so apparently they have converted some Canadian judges to adopt the same policy or be governed by the same principles which govern our equity courts in conjunction with labor disputes. But I think it is quite evident that it is our close connection with Canada and the enormous American investments there which have had most to do with the new trend of the equity courts in Canada. At least their injunctions are in open contradiction with the policy of equity practice in England at the present time.

Senator WALSH. Is their practice governed by anything like the trade union act of England?

Mr. FREY. No. The trade union act applies merely to England and Scotland, and not to Ireland now, or at least not to the Irish Republic.

To carry out the thought that courts were issuing injunctions in connection with industrial disputes in many other countries, Mr. Emery made some lengthy reference to the compulsory arbitration laws in Australia, and the use of the equity courts to enforce that legislation. It was a rather unhappy reference, because of the fact that the workmen in Australia originally thought that there was some great virtue in compulsory arbitration, and some virtue in the State in which we never believed in in the United States, and through their activity they secured the enactment of a compulsory arbitration law.

Depending upon my memory, I would say that was about 28 years ago. The history of Australian industry indicates that there have been many more strikes under the compulsory arbitration law than there was before; also that the law did not work, and some four or five years ago the teeth of the law, which provided for imprisonment for strikes was taken out of the law entirely. Either last year or the year before last. I think it was the year before last, the question became the main issue between two of the political parties in a political campaign, and the group which endeavored to strengthen the compulsory features of the law were overwhelmingly defeated.

Now, it is true that in connection with the operation of the compulsory arbitration law equity courts in Australia did issue injunctions, but I might add with complete failure, so far as preventing industrial disputes and keeping men at work against their will. That is the reason that the teeth were taken out of the law by their parliament.

We endeavored to make it very clear that we had no criticism of equity courts as such, but our criticism was directed to the injunctions they issued during industrial disputes and the new principles of government affecting us which have resulted. Mr. Emery said, that the complaint had been frequently voiced before this committee on our part that the courts of the United States have shown hostility or prejudice to labor organizations. I say that we have made no such statement; that we not only have insisted upon the necessity for government by law through the courts of law, but we have equally insisted upon the necessity for equity courts and the use of injunctions to protect the property; but our complaint has been that, going further than the protection of property, setting aside the basic rules of equity, the courts of equity in many cases have become partisans in connection with industrial disputes, and that as a result of their

injunctions and the decisions of appellate courts, they have set up in this country the peculiar doctrine in many cases that the employer must be free to do certain things or he will be unable to successfully conduct his business, but that if we do the identical thing or the equivalent things we are lawless and must be restrained from proceeding. In the testimony which I was privileged to give to this committee some two weeks ago I called attention to a number of parallel cases where apparently the principle involved and the methods of applying the principle were identical.

In the case where employers alone were involved the court held that it would be outrageous to issue an injunction, and in the case where labor was involved the court issued injunctions to restrain us, denying us the right to even tell anyone that there was or had been a strike, or was or had been a labor dispute. They prevented us even discussing the case.

I had to call attention to one injunction issued against members of the organization that I am a member of, so drastic that our members were not permitted to tell anyone verbally, in writing, in printing, or in any other way, that there was a dispute at the Norwalk Iron Works, at Norwalk, Conn. After thinking the matter over I reached the conclusion that the injunction was a public document, and that the people had to be advised that they were restrained from doing certain things. We had the injunction published and passed around, and it seemed to inform people that there was a labor dispute in spite of that injunction.

Senator WALSH. Did they proceed against you for that?

Mr. FREY. I gave them every opportunity, Senator. I welcomed the opportunity. In fact I violated that injunction publicly so that the court would have a chance to act.

We had a similar injunction issued by Judge Ake, of Stark County, Ohio. I felt it my duty to insist on the right to tell the story, that there had been trouble, and supplied the papers with editorials which I was writing. I certainly violated this injunction, because I preferred to take my chances on what I thought my rights were under the Constitution. But Judge Ake ignored the contempt.

And so we have not, we are not raising any question as to the necessity for courts of equity. We are insisting that the evidence presented to your committee is sufficient to justify the placing of limitations on what courts of equity can do.

It is true that in connection with this point Mr. Emery called attention to the fact that we owe many of our liberties as wage earners to the decisions of the courts. Now, that is true. From the beginning of our history to the present, from time to time some court of law in some prominent case has announced principles which were a guaranty of our right to organize, our right to endeavor to protect ourselves from industrial injustice; but we have had no decisions of that character from equity courts. It is the law courts which have declared that we possess certain inalienable rights as American citizens, and the courts of equity, through their injunctions, which have taken away from us the rights which the law courts declared we were entitled to as citizens that is one reason for our very vigorous protest against existing conditions.

For some reason of which I am not certain, because it is impossible to know what lies in a man's mind, Mr. Emery introduced into his

statement before the committee considerable of the record taken from the Lockwod hearings in New York, before which Samuel Untermeyer played a very prominent part. Apparently, in some of the rules which unions adopted to protect themselves, there were arbitrary features. It was apparently to bring out these arbitrary features which some local unions temporarily had adopted, that this matter has been injected into the record.

If men, whether they are working men, whether they are business men or professional men, associate themselves together and adopt rules which are arbitrary and contrary to public policy, why, then we have our legislative bodies, and we have our courts of law to correct them. What interests me most in connection with the injection of these hearings from the Lockwood commission is that Mr. Emery did not say that he believed equity proceedings should be likewise applied when business men adopt arbitrary rules or methods which are contrary to public policy.

If Mr. Emery intended to infer that because organized workmen had at times adopted arbitray rules equity courts should issue injunctions, as they have, and then he failed to say that the business men, manufacturers whom he represented, were equally willing to submit any question of arbitrary rules in their by-laws and in their policies, to which the public objected to our courts of equity, then I think it indicates a bias. The workman is to be controlled by equity courts and the business man, when he does things which are contrary to public policy, is to have his day in the law courts.

Senator BLAINE. That is the Lockwood hearings which related to the building trades situation?

Mr. FREY. Yes, Senator.

Senator BLAINE. In which the statement was made that the master builders, that is, the employers, and some organized employees had entered into certain arrangements, a sort of a trust arrangement?

Mr. FREY. Yes; there were arrangements entered into between employers and the trade-unions, and then there were rules which the unions themselves had adopted; but it seems to me that if M. Emery had believed that those rules were the proper subject for courts of equity to pass upon he would have shown the sincerity of that contention by saying "And I believe that the same method should apply whenever there is a question involved of conduct against public policy on the part of the employers."

Senator BLAINE. He cited that instance, I think, in support of his argument that the public interest is protected by the present system.

Mr. FREY. He also brought in the fact that within recent years there has been an extension of equity power for the enforcement of statutory law. He referred to the Sherman antitrust law, which provided for equity proceedings to enforce the law, and he also referred to the Volstead Act as also containing an extension of the equity power or, if not an extension, an application of equity power for the enforcement of the law.

Senator NORRIS. Mr. Frey, I would like to hear you on the proposition that has come in several times in the last hearing we had. Mr. Warrum called our attention to several injunctions that were issued, and it seemed to me, in the Indianapolis Street Railroad dispute, where the employees signed a contract, the court seemed to base its injunction almost entirely, so far as I could see, on that

contract. In the cases Mr. Warrum cited the other day, where an application was made to the court to have the employees arrested, or the union officials arrested for violation of the injunction, they were arrested and brought into court, it appeared from reading the complaint that it was made by the coal companies affirmatively to appear that the actions which they complained of were peaceful. It was alleged that they were peaceful. It was alleged that they met different men on the street, persuaded them by argument to quit the employ of the plaintiff. Now he based his right to punish them for doing that on the theory that the affect of their persuasion was to induce those men to violate their contract.

Mr. FREY. Yes.

Senator NORRIS. I noticed in the picketing clause of the injunction it was provided that the pickets could talk to anyone who was not an employee of the company and advise them not to go to work for the company, but they were restrained from advising, even by peaceful means, any employee of the company to quit work while his contract was in effect. They could advise them not to work for the coal company after the expiration of the contract that they had signed. The practical effect of it was to prohibit them from, by peaceful means, requesting those employees to join the union, and the injunction was specified, and named the union, and they were brought into court, they were compelled to sign an agreement to keep themselves out of jail, that they would not solicit membership in the union organization; they they would not try to unionize the mine; that they would not advise any employee of the company to quit work and join the union while his contract was in effect.

It seemed to me based entirely upon that contract. Now I would like to hear you on that.

Mr. FREY. One of our most bitter complaints against many of the injunctions which have been issued in industrial disputes has been that the court assisted the employer in destroying the organizations which we already had, and in preventing our reorganizing.

When I was before you I gave you the United States Shoe Machinery Co. case, and I gave you the Springfield Foundry Co. case, of Massachusetts, both of which had been passed upon by the State Supreme Court. I gave you one or two Federal cases connected with the coal industry, but I can not recall the title of them just now.

What has taken place in recent years, and particularly since the war, has been this, that organized employers, very largely represented by Mr. Emery, Mr. Thom, and Mr. Merritt, have endeavored to prevent the existence of trade-unionism in this country, and one of the means which they have used is this alleged labor contract, popularly known as the yellow dog. I do not know where it derived its name, but the yellow-dog contract is one in which the employee promises that he will give up his trade-union membership, or that he will not join a union, or that he will not take collective action with his fellow employees in connection with any question of wages, and hours that may arise while he remains in the company's employ.

None of these contracts has ever given the workman who signs them a guaranty of work for a definite period of time; none of them that I have examined—and I have studied the question some—has ever provided that for a period of time certain wage rates will be paid,

certain terms of labor maintained. All that they do is to pledge the employee that he will not join trade-union or take any collective action.

Senator WALSH. It seems to me that that contract did obligate the operators to pay the scale for two years.

Mr. FREY. Well, perhaps some have, but most of the yellow-dog contracts I have read do not.

Senator WALSH. But there was no restraint on the operators so far as quitting was concerned.

Mr. FREY. Oh, no. The operators can shut down their plant whenever they want to.

Senator WALSH. In the case of the street railway company they could not have.

Mr. FREY. No, they could not have, but they could have discharged their employees.

Senator WALSH. They were obligated to go on operating.

Mr. FREY. They may have been. I have not read the contract that existed between the Indianapolis Street Railway Co. and its employees.

Many of the largest employers of labor in this country who are members of organizations of employers are opposed to the existence of trade unions or collective bargaining. I have had the privilege of serving recently as a member of the subcommittee in the American Federation of Labor meeting with a subcommittee from the American Bar Association trying to work out some basis by which industrial friction can be minimized under certain rules that all men should obey, placed on the statute books.

Senator NORRIS. What is the result of that?

Mr. FREY. Two weeks ago there was a public hearing in New York, a hearing of employers and the representatives of the organized employers with the exception of the needle industry, they all objected to any further consideration of the subject, holding that it was unwise, saying publicly that they had succeeded very largely in deunionizing the industries of the United States, and to even discuss collective bargaining was unwise at this time, because it might lead to reorganization of employees in many industries.

But to get back to the "yellow-dog" contract, may I give you a specific case?

Senator WALSH. Let me interrupt you there. Can you tell us just what it is that it is hoped to accomplish through that conference of the American Federation of Labor and the American Bar Association?

Mr. FREY. The American Bar Association is endeavoring, through its subcommittee, to discover whether it is possible to enact legislation which would be helpful to industry as a whole, and I believe that the subcommittee of the American Bar Association, after their last meeting, Saturday and Sunday, is now prepared to go before the next convention of the American Bar Association and recommend that this legislation be enacted.

Senator WALSH. Have they outlined the legislation?

Mr. FREY. Yes; they have worked on the outlines of it.

Senator NORRIS. Well, can this subcommittee of the Senate get the benefit of the conclusions reached? Is it secret?

Mr. FREY. I would say this, Senator, that it is in the hands of the subcommittee of the American Bar Association, and our position was advisory. We are not a part of the American Bar Association.

Senator WALSH. Who are the members of the subcommittee of the American Bar Association?

Mr. FREY. Julius Henry Cohen or Henry Julius Cohen, Mr. Rush Butler, of Chicago, Mr. Davis—I can not recall his first name, Mr. Pogue, of Cincinnati, was the chairman of the full committee.

This is how the yellow-dog" contract is used. I will give you one specific case which comes to my mind, namely, the Elmwood Casting Co., of Cincinnati. That company desired to have a non-union plant, which, of course, it had a legal right to have if it so desired. It compelled all of its employees to sign a "yellow-dog" contract. Then the attorney for this company sent a letter to the International Molders Union, saying, in substance:

> This is to advise you that all of the employees of the Elmwood Casting Co. have entered into a contract with the company that they will not become a member of any union while they remain in the company's employ. Any effort on your part to organize these men will be an attempt to prevail upon them to breach their contract, and will lead to immediate legal action on our part.

At that time a similar step was taken in some 8 or 10 different industries in southern Ohio. It was part of a concerted policy.

The "yellow-dog" contract has been developed by the attorneys for the employers and has been used in conjunction with labor injunctions to destroy the possibility of trade unionism in this country. In case after case the equity court has upheld the employer in carrying out that policy. In my previous testimony I cited many cases. I have not got them with me now. As these cases are already in the record, I will but briefly refer to two.

The most perfect monopoly that we know of in this country, or as perfect as any, is that of the United Shoe Machinery Co. They have a large plant at Beverly, Mass. They employ a number of machinists. They desired to deunionize their plant. They presented yellow dog contracts to all of their machinists and frankly told them "Unless you sign this we will discharge you." Now, as they were all members of the machinists' union they got together and said. "What are we going to do? If we sign this contract our union ceases to exist; it has gone up in thin air; it has ceased to exist: there is no more union."

So they decided that they would go out on strike to prevent their being compelled to surrender their right to voluntary organization for lawful purposes. No sooner were they on strike than an equity court issued an injunction restraining them from remaining on strike, and restraining the International Machinists Union from paying them strike benefits or from declaring that a strike existed.

That case went to the Supreme Court of Massachusetts and the supreme court upheld the injunction, establishing judicially the doctrine that trade union organization was not the workers' constitutional or inherent right, but was something which depended upon the employers themselves. If the employers declined to let them remain in the union the equity court would issue an injunction preventing any collective action on their part to prevent the employer's desire to enforce his will, even though that employer was a

member of a State organization federated into a national association of manufacturers.

Senator WALSH. What was the basis for the issuance of that injunction?

Mr. FREY. That the machinists had gone on strike against signing these contracts, against being forced to give up their union; that it was an undue interference with the employer's business; that he had a right to determine whether his employees should be organized or not.

Senator NORRIS. All right; suppose he did have the right. We have to concede that he had a right to employ anbody. Where would the court get the right to issue an injunction to prevent the men from quitting work? Should not he have that same liberty?

Mr. FREY. Well, if equity courts maintained an equal balance between the employers' and the workmen's rights we would not be here this morning.

Senator WALSH. Yes; [illegible] trying to develop what the argument of the [illegible] the injunction when there was no [illegible] these injunctions in the presence [illegible] and it has [illegible] here that the courts have [illegible] prevent [illegible] from inducing any one of [illegible] employees [illegible] breaking [illegible] where they say that equity is just pursuing [illegible] particular cases; but now this case can not be put on that ground, because there was no [illegible] How did the courts proceed in that case?

Mr. FREY. All [illegible] opinion of the supreme court in supporting the lower [illegible] I understand that [illegible] machinists were engaged [illegible] upon the United Shoe [illegible] will.

Senator NORRIS. They put it on the ground that this was a conspiracy?

Mr. FREY. Yes; an illegal conspiracy to enforce organization among the employees against the employer's will.

Senator NORRIS. What did they say? And they order them back to work? What was the order?

Mr. FREY. Well, the [illegible] from remaining on strike, and restrained the International Machinists' Union from issuing strike benefits.

Senator NORRIS. That meant that they would have to go back to work?

Mr. FREY. But they did not go back to work.

Senator WALSH. They restrained the International Machinists' Union from paying strike benefits?

Mr. FREY. Yes; they restrained the International Machinists' Union from paying strike benefits, so that the company filled their plant with other machinists, and it became a dead issue.

Senator WALSH. I can not understand the principle upon which that injunction was issued.

Senator NORRIS. Neither can I.

Mr. FREY. That is one of our complaints, Senator, that it is apparently a matter of individual judicial discretion. I wish that I had the decision here.

Senator NORRIS. Can you tell us where it is? What is the title of the case, and where is it reported?

Mr. FREY. I turned the book over to the reporter, and I understand it was sent back to me, but I have not received it. However, the citation of this case is given in my previous testimony.

(United Shoe Machinery Corporation *v.* Charles W. Fitzgerald, et al., in equity No. 1849, Supreme Judicial Court of Massachusetts.)

Senator WALSH. We have arrived at this conclusion, now, that the court would grant an injunction to restrain the labor organizations from counseling a breach of the yellow-dog contract.

Mr. FREY. Yes.

Senator WALSH. Now we go a step further, and we find there is no yellow-dog contract, and still the court will issue an injunction.

Mr. FREY. Yes. I will give you a case where there was no yellow-dog contract in the beginning.

Senator NORRIS. That is one that you have just given?

Mr. FREY. I will give you one where the yellow-dog contract did not come until later.

The Springfield Foundry Co. desired to run a nonunion plant. They employed in advance a sufficient number of men to fill the establishment. After having secured them it discharged all of its union employees. They discharged them all, and the following morning their places were filled with nonunion men.

As soon as the nonunion men got to the plant they were compelled to sign the yellow dog contract. The court issued an injunction restraining the men who had been locked out from talking to nonunion men, from declaring that a strike existed, from doing anything which would be an interference with the employer's right to do as he pleased, and that included peaceful persuasion, discussion of what was involved; and the case also went to the supreme court.

Senator NORRIS. And they sustained it?

Mr. FREY. And it also sustained it, and the citation you will find in my previous testimony.

So that we have, in connection with these injunctions in labor disputes, the obligation of an alleged form of contract and our denial of the right to do anything to protect the organization we have from being destroyed. These injunctions have been issued to prevent us from endeavoring to organize unorganized workmen, as in the case of those several Federal injunctions issued against the United Mine Workers' Union, particularly in the West Virginia field where the right of the officers or the members or the agents or friends of the United Mine Workers are restrained from in any manner or in any way endeavoring to organize nonunion miners. The citations are in the record. The attorneys for the United Mine Workers introduced quite a few.

Now, we have had those; and while I refer to State legislation I am doing so because State courts believe that they are supported by Federal courts and Federal decisions—that is, Federal courts sitting in equity, and by decisions rising out of those injunctions.

Little by little they have built up a judicial law which determines that certain things are illegal to strike for. Massachusetts being a good illustration. As a result of various decisions of the State supreme court it is now judicially illegal in Massachusetts for workmen to strike to protect themselves from the introduction of non-

union men in the shop or on the job for the purpose of destroying the organization. It is illegal for them to strike for the purpose of maintaining discipline over their own members, or for the collection of dues.

To illustrate, there may be a union plant—I have one in mind now that is on friendly terms with us, and I do not want to mention their name. Some years ago they wanted to deunionize their plant. They went to a number of the workmen and they said, "You don't have to pay dues to work here"; and that was quite true, but the continual pressure finally led some of those men to feel that they would stand better with their employer if they stopped paying dues into the organization, and so a number of them became suspended for nonpayment of dues; and the men wanted to go out on strike, but I happened to go there. I knew the management. I had been dealing with them for 20 years. They said, "We are glad you are here, Frey, because you know the law—not the law on the statute books but the decision of the State supreme court—that it is illegal to go on strike to compel members from remaining behind in their dues." The general manager said, "You know the law, and you know that your members can not strike." I knew that was true because that was the decision of the State supreme court in cases arising out of injunctions over the same question.

But the employer finally changed his mind. He knew that if he locked out his men we would then be legally able to pay strike benefits, and so the men took a vacation in the shop. They reported, and when the whistle blew in the morning they were there, and they stayed there until the whistle blew at night, waiting for the firm to do one thing or the other. If the firm discharged them, then they would go out and would be paid strike benefits, and the firm knew that, and they knew if they struck we could not support them. And so out of it all came watchful waiting. We were able in that case to get around these judicially created laws.

Senator NORRIS. Well, under the law there, as I understand it, that you were faced with in that case, if the men struck, or if they discharged the men, rather, then you could pay them benefits?

Mr. FREY. Yes.

Senator NORRIS. If they did not discharge them they had to pay them?

Mr. FREY. No.

Senator NORRIS. Did they not pay them as long as they were in their employ?

Mr. FREY. No. They were all piece workers. The men simply went in. They did that for four days. They went in in the morning and simply stayed there.

Senator NORRIS. And did not do any work?

Mr. FREY. They did not do any work, but stayed in their places.

Senator NORRIS. The only effect of their presence was that they kept somebody else from occupying their place? They didn't do any work?

Mr. FREY. They didn't do any work.

Senator NORRIS. They didn't get any pay?

Mr. FREY. No; they didn't get any pay.

Senator NORRIS. Well, as I understand it, then, the employer came to time because he could not get them out of that place to put somebody else in there without discharging them?

Mr. FREY. Without discharging them, and I was hoping that he would. I was rather disappointed, in the first few days, that he did not. Finally the employer and I had a talk, and he admitted he could not help his action, that pressure had been brought to bear on him, he was the only large union shop in the city, and he said, "I had to do it. I know it was a mistake."

Not only in Massachusetts but in other States, the result or injunction in labor disputes and the opinions of the highest court in the State judicially made law has established this, that, and the other condition for which it is illegel to strike, and some of those are, striking for the purpose of maintaining our organization when the employers attacks it——

Senator NORRIS. Those men under those conditions could quit singly, of their own accord, in Massachusetts, for instance?

Mr. FREY. Oh, yes; but if they quit singly——

Senator NORRIS (interposing). The injunction, as I understand it, deprives them of any concerted action.

Mr. FREY. If they quit singly, at the same time, I feel confident what the court would do, and quitting individually would not mean anything to them. If a situation developed which aroused men's sentiments to such an extent that they were willing to strike and they attempted to quit individually while they were under these emotions, under this smart of injustice, if they took a week to all get out together, I am quite satisfied that many equity courts would hold that that was proof of a criminal conspiracy, and the fact that they did not all quit at the same minute was evidence of their intent to disguise the fact that they were in a criminal conspiracy to injure the employer.

Senator NORRIS. And they would be brought before the court for contempt?

Mr. FREY. Yes. In the Massachusetts cases and many other State cases and some Federal cases which I have read it becomes quite evident that the court is convinced that what the workers have done is with the malicious intent to injure the employer. The workers are not credited with doing something to protect their interests, but the injury done to the employer is considered to be the motive which moves the workmen. In other words, if the employer decides that he must effect a reduction in wages and the workmen go out on strike to resist that reduction and tell the story of why they went out on strike through the press, talk to nonunion men who may come thinking that there are good positions for them, the court, in case after case, construes the men's action as a malicious effort to injure the employer, and that is something which we are continually confronted with in connection with equity court proceedings where there are labor disputes. That is one of the constant obstacles that we have to deal with. But when the employer does something, when the employers in a district, as we have it now in innumerable districts throughout the country where the metal industries are large, combine not only to reduce the wages, but to put our organizations out of business, why, the equity courts say, "To restrain that right is to deny these business men the right to conduct their business."

So we must accept the reduction in wages with a smile or, if we do anything, immediately an injunction will restrain us.

Was there anything further on that "yellow-dog" contract?

Senator WALSH. Yes. I would like to know something about how general is this conspiracy, if it may be so designated, against trade unions.

Mr. FREY. I would say that the employers in 90 per cent of the metal-working industries in the United States are members of organizations, one of whose cardinal purposes and principles is to prevent trade-union organization. They masquerade behind so-called open-shop plans or American plans, as they call them, and they build up a machinery to make trade-union organization impossible.

Let us give you one concrete illustration. I have in my possession the printer's proofs of the card-index system applied by the Metal Trade Association, of Cincinnati, Ohio. Cincinnati is the largest machine-tool manufacturing center in the United States. The members of the association have an agreement that they will not employ a man which another employer has had unless the previous employer grants his consent. They have a permanent office in the city. They have a secretary, a most competent man, and numerous assistants. Among their rules is this, that every time an employee is hired the firm sends the information to the association's central office, with that employee's name, where he came from, and at what rate he went to work, all written down on that card.

Senator WALSH. That is in effect a black list?

Mr. FREY. Well, it works as a black list.

Senator WALSH. Has not that been declared, in litigation, to give the man a right of action?

Mr. FREY. Now, the courts, in every case that I know of, when this question is brought to them, that is, the final court of appeals—there may be an exception, but I am not aware of it, have held that the employer's right to discharge for any purpose satisfactory to him must be protected by the courts.

Senator BLAINE. Mr. Frey, in the affairs of the Government of the United States, with respect to employees, has not that practice existed among civil-service employees, that an employee discharged from one department can not obtain employment from another department without an indorsement from the person who discharged him, which indorsement he can not get?

Mr. FREY. I am not sufficiently acquainted, Senator, to answer that.

Senator WALSH. It occurs to me, Senator Blaine, if one company has a half dozen different shops and a man is discharged in one shop the employer would be quite within his right to send around word to the several departments informing them that their shop is not to employ that man. But that is different from sending out to other employers information about the man with a view to preventing his employment. Here, you see, the Government of the United States is one employer.

Senator BLAINE. In that department, but a person is discharged from a department it may be through the ill will that he has incurred on the part of the head of the department, and he discharges him for that reason or for some other reason, or for no reason, and that person makes application to another department, and he can not secure employment in that other department.

Senator WALSH. But what I am getting at is the Government of the United States is the employer always, though these are different branches of the Government.

Senator BLAINE. Is not that a system of black list?

Senator WALSH. I do not mean to say that the rule ought not to be applied, but this is what I mean, that there is this distinction between a man sending around to different branches of his particular business notice not to employ a certain man, and sending out notice to everybody in the country associated with him in some kind of an association.

Mr. FREY. But this system goes further. They have the black list in a number of cities.

Senator WALSH. Yes; but what I wanted to ask you is whether it has not been adjudicated that there exists the right of recovery on behalf of the man who is a victim of the black list.

Mr. FREY. Not that I know of. There has been an effort in several of the States to enact legislation making black listing illegal, but that legislation was all declared unconstitutional by the United State Supreme Court on the ground that it deprived the employer of certain constitutional rights.

But the system used by the metal trades goes much further. In some cities where the employers are sufficiently powerful the secretary of their association gives an applicant for work a permit to look for work, and no metal-trades employer will give any consideration to a workman who does not come with a permit from the secretary of the association to look for work in that city. It is all part of a general policy.

Senator WALSH. How generally is Mr. Emery's association—that is, the Manufacturers' Association—identified with that movement?

Mr. FREY. Mr. Emery represents those groups in the metal trades which are particularly active in carrying out that policy.

Senator WALSH. I wanted to know to what extent, if at all, this association, the National Association of Manufacturers, is identified with this movement to deunionize its shops.

Mr. FREY. It has declared itself for a number of years in favor of so-called open shops, the so-called American plan, and the National Metal Trades Association, which is a part of and affiliated with the National Association of Manufacturers, is the one which, more than any other group of employers that I know of, has brought forward every device their attorneys can conceive of first, to destroy the organization which we have and, second, to make it impossible for us to ever organize.

Senator WALSH. Is the United States Chamber of Commerce identified with that movement?

Mr. FREY. I think not. I am convinced the United States Chamber of Commerce leaves that question to the other associations.

Senator NORRIS. Now the question presents itself to me as a practical question, assuming that the committee reaches the conclusion that they would like to prevent the uses that we have been speaking of here in injunction proceedings, what amendment would it be necessary for us to frame to the Clayton Act that would accomplish that? For instance, suppose the committee reached the conclusion that it wanted to prevent the use of injunction based on these contracts, it wanted to prevent the use of injunctions that pro-

hibits somebody not in the employ of the company advising those who are in the employ of the company to quit if they wanted to, whether they had a contract or not, what kind of a law could the committee propose to the Senate that would bring about that result?

Mr. FREY. Well, Senator, if I was a lawyer I might be helpful. I am not a lawyer.

Senator NORRIS. Well, one would think, from your argument and your familiarity with the things that we have been talking about, that you are a lawyer.

Mr. FREY. I have never studied law. But the Federation of Labor has lawyers, and I presume that those lawyers are quite willing to give serious consideration to what could be done to frame a law in such form that it would be constitutional and, at the same time, would prevent us from suffering under the terrible un-American condition which has developed out of injunctions.

Senator NORRIS. I confess that I was rather shocked at some of these instances where the court said nobody has any right to advise these men to break that contract. I had assumed that a court of equity would not, by injunctive process, do some of the things that they apparently have done. If a man violates his contract he is liable, of course, for whatever damages may follow, whether he is a laboring man or whether he is a manufacturer, but I did not suppose that a court of equity would issue an injunction that would restrain me, as an attorney, for instance, from advising you to break that contract and quit; but the courts have gone that far, as I understand it.

Mr. FREY. The opinion of Dean Roscoe Pound and Francis Bowes Sayre, of Harvard; Prof. Herman Oliphant and Professor Chamberlin, of Columbia University, and a number of other most competent teachers of law, is to the effect that so far as the yellow-dog contract is concerned all that is required is a statute which makes that form of a contract null and void. So far as the yellow-dog contract is concerned, that will immediately stop its operation. It will destroy the value now placed upon it by some employers.

Senator NORRIS. Well, that presents a little different question to me. I would not want to declare by statute that a man who wanted to work for you should not make a contract with you. If both of you agree and want to make a contract you have a right to do it. Either one of you can break it if you want to.

Mr. FREY. In Ohio, where I lived for awhile, it was necessary for the State to pass a law declaring any contract null and void which influenced the way the worker would vote, and which added a penalty to it, and I think if any employer incorporated into a contract of employment a provision that, during the period of the contract the employee would not be a member of the Catholic Church, a Protestant Church, or a synagogue, there would be no hesitancy, and in fact there would be rapid action on the part of the legislative bodies declaring that kind of contract null and void.

Senator NORRIS. I should think so too, but I am trying to avoid a difficulty that might come up afterwards. If a new contract came to the attention of the court, the court might say, "This is a good contract."

Assume for the sake of the argument, that you go so far as to prevent a man from carrying it out. I do not understand where the

limit will be. Suppose a farmer makes a contract to sell a hundred bushels of wheat and I advise him that he had better not do it, or maybe I would advise him wrongfully. That would not make any difference. The court comes along and enjoins me from advising him not to. I may have good reason, or I may have none. I did not want to get into that distinction, because that goes into another question. Why, if the man who is going to supply the hundred bushels of wheat does not do it, is not the other fellow entitled to damages?

Mr. FREY. He most certainly is.

Senator NORRIS. Why should he not go into court and get damages, and why should he not be confined to that?

Mr. FREY. He should be.

Senator NORRIS. Where does the court of equity come in at all?

Mr. FREY. It should not.

Senator NORRIS. Then why should not I advise him to do what the law permits him to do?

Mr. FREY. Most assuredly you should, but in the yellow-dog contract what makes it what we object to is the condition that as a part of the terms of employment the workman must surrender his right to voluntary association.

Senator NORRIS. All right. Let us take that. For the sake of argument assume the contract based on a consideration, which probably it is not——

Mr. FREY. Not on a sufficient consideration.

Senator NORRIS. And you want to quit, notwithstanding that contract, and you do quit.

Mr. FREY. Yes.

Senator NORRIS. Have not you a right to do it?

Mr. FREY. Oh, yes.

Senator NORRIS. Well, can not I advise you to do that?

Mr. FREY. Yes.

Senator NORRIS. Then why should there be an injunction restraining me from giving you that advice, whether it is good or bad?

Mr. FRY. Because the courts of equity have abandoned all of the basic rules of equity in connection with industrial disputes. That is one of our complaints. It is a question of one man's opinion as to what should be done in connection with an industrial dispute, and almost invariably the decision restrains us from doing those things which we have a lawful right to do as citizens, and which are most essential to the welfare of the communities in which we live.

Senator NORRIS. If we undertake to declare by statute the contract, as we describe it, null and void, I think there is a constitutional question involved whether we could do it or not, and if we did do it and it is upheld, and the courts decide that that law is good, the next thing that would happen is a different contract that has got something in it, devised by some shrewd attorney, different from the old contract, and some equity court would say Congress did not have that contract in mind and the court would issue an injunction, and we will have it all to go through again.

Mr. FREY. Perhaps so, but after the Civil War a question arose among the planters as to how they would carry on their plantations. Their attorneys said "There is a way of getting away from this," and so they provided contracts for the payment of provisions given to the negroes through the negroes' labor so that the negro

became as firmly attached to the plantation as a serf was ever attached to a baronial manor. And what was the result? That was considered contrary to public policy, and the antipeonage law was enacted. Every time the question has come before the United States Supreme Court in connection with its constitutionality the law has been upheld. So that we found our Congress enacting a law which provides that a certain form of labor contract is not only null and void but that those who endeavor to secure one will be punished not only by fine but by imprisonment, and we have some men from Southern States in the Atlanta Penitentiary now for violation of that law.

Senator WALSH. But that situation exists by virtue of the provision in the thirteenth amendment that Congress shall enforce the amendment by appropriate language.

Mr. FREY. Yes.

Senator WALSH. And the power of Congress to legislate in that case was put upon the ground that it was necessary to pass that legislation in order to make the body of the thirteenth amendment effective. In other words, that this was just merely a means of securing involuntary servitude.

Mr. FREY. I am just referring to that as an evidence of where it has been found that a contract for employment containing provisions that are prejudicial to public welfare, that that kind of contract is declared null and void.

Senator NORRIS. I am trying to draw a distinction between a contract that is declared to be null and void by act of Congress, and the right of a judge to issue an injunction restraining anybody from violating a contract of that kind when it seems to me there is a clear and adequate remedy at law if it is violated.

Senator WALSH. Of course, Senator, the argument is that there is not a remedy at law.

Senator NORRIS. The only argument that could be made of that kind would be that this man is not worth anything and if you got a judgment against him it would not be good. But as a matter of law, that is no reason for issuing an injunction.

Senator WALSH. They also say it is necessary to avoid multiplicity of suits.

Senator NORRIS. If there is a multiplicity of suits it is because they have a multiplicity of contracts, and that is no argument.

Mr. FREY. They also claim that the law is not a protection when there is an industrial dispute.

Senator NORRIS. I can remember way back a great many years ago it used to be a common thing where I lived to hire a man commencing the 1st of April to work until the 1st of December. It was very seldom another man was hired through the entire year, and he would work along, we will say, until the middle of August, and then deliberately quit, sometimes without any cause whatever, when the man was in the midst of a harvest. Nobody ever thought of such a thing as a judge issuing a restraining order preventing somebody from advising that man to quit. He had his remedy, it is true, at law, although the man who quit might not have been worth a dollar, and he could not collect the judgment from him. But that was not held to be a denial of a remedy. He could at least get a judgment, if he could prove damages.

Senator WALSH. But that is not an identical situation.

Senator NORRIS. Maybe not.

Senator WALSH. If you had a man who employs about a thousand men on his farm and those thousand men all quit together, or agreed to quit at one and the same time, so that he could not go out and get a thousand men to replace them, you would have a similar situation.

Senator NORRIS. Well, often it is as hard in the busy season in the farming country to get one man to replace a fellow who has quit as it would be to get a thousand men. It is an absolute impossibility even to get anybody in the busy season to take the place of someone who has quit.

Senator WALSH. The argument is that they quit together so as to make it more difficult.

Senator NORRIS. These injunctions, Senator, that we have been having here, go so far and on their face they do that very thing, and the complaint specifically sets up that these men or this man met John Jones on the street on the 1st day of April at 10 o'clock and by peaceful means he persuaded this man to quit the employ of the plaintiff. Now, he gets an injunction restraining that fellow from peacefully arguing with him and persuading him. You must assume, it seems to me, in these cases, that there must be at least lots of them where the man has good reason to quit, where the fellow talks with him and convinces him that he ought to quit. We have got to leave that liberty to the citizen or we will have slavery, it seems to me, and we can not inquire into his motive, it seems to me, if he does it peacefully.

Senator WALSH. These gentlemen that you spoke about discussing the yellow-dog contract, have they got any advice on the constitutionality of the legislation?

Mr. FREY. Oh, yes. It was Mr. Pound—Dean Roscoe Pound.

In Coppage *v.* Kansas the Supreme Court held the Kansas law, which made it illegal to discriminate against union men, unconstitutional on the ground that it interfered with the employers' property rights. I have been very much interested in this yellow-dog question. The Ohio State Federation of Labor had a bill introduced in Ohio, and at the last session it was passed by a vote of 29 to 3 in the Senate, and it failed by 8 votes to get the two-thirds majority to take it out of the hands of the rules committee in the house.

Mr. Pound held that in Coppage *v.* Kansas the Supreme Court held the law was unconstitutional because of the penalty attached; that it was a mistake to have had a penalty, that that was wholly unnecessary, that all that was needed was for the statute to declare a certain type of labor contract null and void, then there can be no injunctions issued, and there can be no threats of suits for damages, and it will lead to the abandonment of that one method by employers in their efforts to deunionize.

The bill was drafted with the one thought in mind that it must eventually reach the United States Supreme Court. We wanted its provisions stated so definitely that there would be no question as to its purpose and, secondly, conditions provided for which would meet the test of constitutionality.

Senator WALSH. In most cases the man is coerced by his economic circumstances.

Mr. FREY. Yes. He has no alternative. He has children, he has a home, he has property, is paying on a home, paying on an automobile, and his job is the all-important thing to him, the only thing by which he can live.

Senator WALSH. The right to contract is restricted by legislation in very many ways.

Mr. FREY. I have secured a large number of court decisions in connection with labor contracts.

Senator BLAINE. That is where the contract involves public policy, but not as it affects the individual. Only as the contract relates to public policy.

Senator WALSH. But the legislature has a large discretion in legislating on matters involving public policy.

Mr. FREY. I would like to call to the committee's attention very briefly two cases which we think bear out our contention that when employers are involved the equity court finds one way, and when we are involved it finds another, even when it comes to the United States Supreme Court.

The first is the famous case of United States *v.* Industrial Association of San Francisco et al. (293 Fed. 925).

In that case an injunction was issued on the request of the Attorney General of the United States.

Senator NORRIS. I notice that you have cited the circuit court. It is not the Supreme Court. Did that case go to the Supreme Court?

Mr. FREY. It went to the Supreme Court, but I want to quote from the circuit court first.

Senator NORRIS. All right.

Mr. FREY. An injunction was issued and it was upheld by the circuit court. The facts of the case are well stated by the circuit court. I will quote to some extent from Judge Dooling:

> This is an action in equity to restrain the defendants from further executing an alleged conspiracy in restraint of interstate and foreign commerce and to dissolve certain of the alleged conspirators for the more thorough attainment of the object of the suit. The defendants named are about 40 in number, among them the builders exchange and the Industrial Association of San Francisco, together with corporations, individuals, and partnerships belonging to each.

Further on:

> From all this mass of evidence, while it is contradictory, certain facts stand out clearly. The first is that the defendants are acting in concert for the purpose of putting into effect and maintaining what they have designated the American plan in the building industry in San Francisco and some of its neighboring counties. The American plan contemplates the employment of union and nonunion men in equal proportions, with a nonunion foreman on each job.

The opinion then goes on to say that with that, of course, the court has nothing to do.

Further on the opinion reads:

> And this brings us to the second fact, that the evidence clearly shows, and that is that the so-called permit system is the principal means by which the concerted action of the defendants is rendered effective. Under this system no one can purchase building materials covered thereby without obtaining a permit from the permit bureau of the builders' exchange, and no one can secure such permit who will not pledge himself to run his job on the American plan. Under the permit system were first placed cement, lime, plaster, ready-mixed

mortar, rock, sand and gravel, common brick, fire and factor brick, terra cotta, and all clay products.

Defendants disavow any intention to interfere with interstate commerce and claim that these materials were selected because they are produced within the State and were carefully selected in order to avoid such interference. Later, however, by the permit bureau other materials were placed under the permit system, several, if not all, of which were produced without the State. It is claimed that as to these the permit was never actually required, but the fact remains that they are on the proscribed list pertaining to the declaration of the industrial relations commitee of the builders' exchange in whose hands the machinery for bringing into effect the American plan was placed, that if necessary and as soon as proper arrangements can be made the permit system will be extended to all other materials used in the building trades.

There had been a strong sentiment of antagonism developed in San Francisco, and an effort was made to place the unions out of effective existence. To do that in the building trades many of the contractors and building supply firms entered into an agreement that any employer who maintains friendly relations or agreements with the union should be unable to purchase material through the builders' exchange, so that they would be unable to secure building material from the agencies which handled the building material without a permit from the builders' association. The builders' association gave permits to buy material only to those contractors who were carrying out the nonunion policy of the industrial association. Now that involved plumbing supplies and many other things coming into California from other States. In fact, the case aroused nation-wide attention, and finally the Attorney General said he would put a stop to it——

Senator WALSH. The Attorney General of the United States?

Mr. FREY. The Attorney General of the United States, Mr. Dougherty. He applied for an injunction and was very much interested in the case. That case went to the United States Supreme Court, under the title "Industrial Association of San Francisco, Calif., Industrial Council, Industrial-Association of Santa Clara County et al., appellants, *v.* the United States of America. Mr. Justice Sutherland delivered the opinion of the court.

Senator WALSH. Evidently the injunction was granted by the lower court.

Mr. FREY. Oh, yes; and the circuit court sustained the action of the lower court.

Senator WALSH. That is, the State court?

Mr. FREY. No; the Federal court. This was purely an industrial dispute, and the permit system evolved out of the industrial dispute as a means by which the employers could carry out their desire to deunionize the building industry. The Supreme Court raised the question of intent early in its opinion. I quote from the decision:

The thing aimed at and sought to be attained was not restraint of the interstate sale or shipment of commodities but was a purely local matter, namely, regulation of building operations within a limited local area, so as to prevent domination by the labor unions. Interstate commerce indeed commerce of any description, was not the object of attack.

Senator WALSH. It seems to me it does not make very much difference what the intent was if the effect was to restrain commerce.

Mr. FREY. I want to quote another United States Supreme Court case as a contrast.

Further on the opinion reads:

No doubt there was such an interference, but the existence of it being neither shown nor perhaps capable of being shown is a matter of surmise. It was, however, an interference not within the design of the appellants but purely incidental to the accomplishment of a different purpose.

And I want to particularly call attention to that one sentence:

It was, however, an interference not within the design of the appellants but purely incidental to the accomplishment of a different purpose.

And then the opinion continues:

The court below laid special stress upon the point that plumbers supplies which, for the most part, were manufactured outside of the State, though not included under the permit system, were prevented from entering the State by the process of refusing a permit to purchase other materials which were under the system to anyone who employed a plumber who was not observing the American plan. That is to say in effect that the building contractor being unable to purchase the permit materials, and, consequently, unable to go on with the job, would have no need for the plumbing supplies, with the result that the trade in them to that extent would be diminished. But this ignores the all-important fact that there was an interference with the freedom of the outside manufacturers to sell and shipper the local contractor to buy.

Now, the court apparently lays down the doctrine that intent is——

Senator NORRIS (interposing). Well, the Supreme Court reversed that decision?

Mr. FREY. Yes. This is the opinion of the Supreme Court reversing the opinion of the circuit court of appeals.

Senator NORRIS. The Supreme Court reversed it on the ground that, while there was some interstate commerce involved, it was only incidental, and it was not the real issue?

Mr. FREY. It laid down the doctrine that intent must enter into the court's consideration.

Senator WALSH. But they did not hold that that was the effect of the agreement before it?

Mr. FREY. No; they did not pass on the agreement at all. The agreement itself was not argued. It was the interference with interstate commerce that was argued at that time.

Senator WALSH. How did the court divide?

Mr. FREY. I can not tell you how the court divided on that.

Senator NORRIS. I think it was a unanimous opinion; I do not think there was any division.

Mr. FREY. Now, we come not to an identically parallel case, but to a case where much the same situation was involved; purely an industrial dispute, purely an effort of an employer to deunionize his plant; and that is the Bedford stone-cutters case.

Senator WALSH. Let us get back to the other. Did the court hold that that particular contract did not materially interfere with interstate commerce?

Mr. FREY. I think in its opinion the court says that, without a doubt, the fact that the contractor employing union men could not get any other building material prevented his finding it necessary to get outside material.

Senator WALSH. The circumstances might not justify that conclusion, of course, but there seems to be no principle of law laid down; but simply that the result there did not materially affect interstate commerce.

Senator NORRIS. Well, if they would follow that same logic, then they would have to hold in the strike in the coal case that although interstate commerce was interfered with incidentally, because they did not get any coal to ship out, that after all the real intent and the object to be accomplished had nothing to do with interstate commerce, but that it was simply incidental and followed as an incidental proposition. But when they came to the coal case they decided it differently, did they not?

Mr. FREY. In the Bedford Stone Cutters case they did.

Senator NORRIS. They held that they did interfere with interstate commerce, and, therefore, the court had jurisdiction.

Mr. FREY. We think that in the Bedford Stone Cutters case the Supreme Court held the very opposite.

Senator NORRIS. I think they did. It seems that way to me. I can not harmonize them.

Mr. FREY. The Supreme Court held the very opposite to the Industrial Association case.

Here was a company engaged in quarrying and stone cutting. It had maintained friendly relations with its trade-union employees for a long term of years. They, with a number of other quarrying companies in the same district, decided to deunionize their quarries. They wanted nonunion men, so they discharged their union employees. They refused to enter into any agreement with them. They laid them off. They said, "We don't want you any more. Get out. We want nonunion men." They were within their legal rights. You might question their moral right, but they were within their legal right. They were secure. They severed their connections with all the locals of the union whose members they had discharged. The local unions in self-protection said, "We simply will not work on that stone. We will not work on that stone when it comes to us," as they had the right to do, but an injunction was issued restraining the members of that union from refusing to work on that stone, no matter where it went, because it was held to be an interference with interstate commerce.

Now, I submit that what occurred as a result of the union's action was incidental to its desire to prevent any further diminution of its membership by hostile employers. The union was fighting a life and death battle to maintain itself, and the difficulty that the company had in having its stone cut was incidental to the efforts of the members of the stone cutters' union to protect its organization from annihilation.

I refer to those two cases because they tend to sustain our view or our belief that from the lower State court to the United States Supreme Court itself, when injunction cases arising out of labor disputes, are passed upon, the higher courts instead of giving us even-handed justice, instead of maintaining equality rights as between citizens, so tie our hands that we are denied the right of self-defense, and that in no instance does the equity process ever interfere with the employer's right to attack us as he may desire. Now, we believe that we have certain inalienable rights. We believe that our right to trade union membership is as thoroughly guaranteed by the Constitution as our right to belong to a political party, or to belong to any church that we have in mind to. But out of our wonderful industrial development, the wealth we have created, the opportunities

it has presented to some people to accumulate a great deal more, there has arisen a policy, particularly active since the war, to destroy the trades-union movement as a whole. Our right to organize, equity courts tell us, not an inherent right; we can only exercise it under such rules as they lay down. If those rules were laid down by Congress and we were not satisfied with the law we would endeavor to have the law amended, but we have no recourse whatever, because equity operates so differently from the law.

We have this serious question in our mind. We find, little by little, our right to maintain our existing organizations taken away from us by equity courts. We find our right to attempt to organize the unorganized denied us by writs of injunction. If we are to obey these injunctions we are going to fold up tents and say, "Due to the decisions of State and Federal courts sitting in equity we are going to lay down, because th[illegible] have not the right to do these things, that [illegible] maintain trade-union organization wh[illegible]t. When the employer withho[illegible] then e[illegible]in to assist the employer in [illegible]g h[illegible]tablishm[illegible]

That is t[illegible] situati[illegible]hich w[illegible]-day, and we have been[illegible] these inju[illegible]se [illegible] cases before you not b[illegible] were [illegible]ut b[illegible]me of them might he[illegible] [illegible]te co[illegible]he working man of t[illegible] [illegible]n no co[illegible] employers more tho[illegible] or[illegible] [illegible]here. [illegible] have they taken a g[illegible]dvanta[illegible] [illegible]d I believe in their c[illegible]tion. I[illegible] [illegible]mmerce can be succes[illegible]rried [illegible]mbers [illegible]ce, without city and [illegible]d N[illegible] [illegible]ions of e[illegible]rs federated together, b[illegible] [illegible]e depen[illegible] exchange of opinion and [illegible]y of th[illegible]blem[illegible]hich the commercial and t[illegible]ial mind m[illegible]al[illegible]

We are in t[illegible] [illegible]ght of collective active, collective [illegible] [illegible]ould industry be? What developed in t[illegible] [illegible]he period when it had prevented trade-union or[illegible] [illegible]a number of years? The 12-hour day for one-third of all its employees—a 12-hour day defended on the ground of economic necessity.

Senator WALSH. I thought President Harding had fixed all that up.

Mr. FREY. It has been changed, but it would not have been changed had it not been for the activity of the trade-union movement and our continual calling public attention to the socially, morally unsound industrial condition of that industry.

Senator WALSH. What has been the result of the change?

Mr. FREY. The change has been just what we said it would be. Their own statement, Judge Gary's statement a short time before his death, indicated that with the reduction of the hours of labor from 12 to 8 for one-third of the employees the per capita production had increased about 50 per cent. That is not due wholly to shorter hours of labor. Improved methods of production have had a great deal to do with that.

Senator WALSH. What change did ensue?

Mr. FREY. The change from 12 to 8 hours and the breaking up of the contnuous system. Because of that 12-hour day many steel

workers had to work seven days a week. It was continuous work until they had to quit and be let out by some one else.

I could tell this committee a story of industry in Marion, Ohio, where I made an investigation just before Mr. Harding was elected, that would be a disgrace to India or Russia in the worst days of czarism, where a few people absolutely dominated every opportunity in life for the citizens of a large community.

What we are endeavoring to do is to have the right to maintain and protect our organizations. So long as courts of equity continue to issue the type of injunctions that they are issuing we can not have that right.

Our sacred right has been taken from us. We can not even talk. We can not tell our story when the court issues that kind of an injunction. You have had laid before you injunctions by Federal courts which restrain anybody from trying to organize the unorganized. You have had injunctions which protected that form of contract called the yellow dog. We have nothing now to protect our constitutional rights, which we always believed were ours. We find them valueless whenever an equity court judge wants to get busy. It is true that some of these outrageous injunctions eventually are passed on by a higher tribunal, and declared too severe; but that is like impaneling a jury after a fellow has been hung. It does not do him any good. An injunction declared to be null and void in some of its features six months or a year, or two years later is of no avail at all to us.

Senator WALSH. It would be a guide for the future.

Mr. FREY. A guide, Senator Walsh, to set aside. Judge Sanborn, a Federal judge, issued an injunction in 1906 against members of the molders' union. That injunction became a famous one. We wanted the ablest legal services we could have. I felt that the judge had done an outrageous thing, and I went and saw President Roosevelt and told him that I thought that Judge Sanborn had done a most outrageous thing, that a branch of his administration had taken away our most essential rights.

He became interested in the case, and as one result Mr. Taft became interested, and it followed that they gave us advice as to attorneys. Mr. Frederick N. Judson, of St. Louis, now deceased, was requested to take up this case.

It was tried before the United States Circuit Court of Appeals in Chicago, and there, by unanimous opinion, the court laid down the doctrine, among other things, that when a labor union in conformity with its own local laws, and in conformity with its national constitution, went on strike against an employer, every member of that national union was on strike against that employer. The opinion held that because of the fact that the employer has been declared an enemy of the union under the union laws, and under the unions constitutional method of procedure, then it followed that such an employer was an enemy of that union wherever his work might go.

So that eliminated the doctrine of illegal conspiracy when we refused to work on the patterns of a firm where our members had gone on strike in conformity with our laws. That was sound doctrine, it seemed to us. That endured as the rule until finally another case comes to the United States Supreme Court, and it sets it aside and says it is no longer of any value to us.

In the field of equity, in connection with industrial disputes, we never know where we are. Nobody knows where he is. It is not like the law. It is not something definite. It is not like the law which determines the jurisdiction of a court. It is not like the law which determines in advance what kind of a penalty the judge can fix for the degree of crime the jury may find; but when it comes to equity nobody can tell us what to do, or what our rights may be.

Some years ago, in Cincinnati, an injunction was issued. We wanted a good lawyer. We went to Judge Dudley Outcalt, who is one of the ablest corporation lawyers in the country. He told us frankly that he would not take the case because it would interfere with his other work.

We said, "We have this injunction issued against us, and we are in a desperate condition. What can we do under the terms of the courts order?" He said, "You can do this, that, and the other thing." We said, "Are you certain we can?" He said, "Oh, yes."

Several of us were cited for contempt of court inside of three days, and were in danger of going to jail. We went to Mr. Outcalt and said, "This is what we did, and this is what you told us we had the right to do, and here is the situation in which we find ourselves." Mr. Outcalt said, "In view of that you would have a hard time to prevent me from being your chief counsel. You have followed my advice, and now, I am going to see it through."

He did see the case through. He won out completely in the circuit court of appeals. He won out completely in the State supreme court, but inside of six months another county court has issued an injunction very similar in its terms, in another industrial dispute, and anybody would be in contempt for violation of that injunction.

Again we had to go to the circuit court of appeals and had to apply to the State supreme court. Apparently the decision of the higher courts have little effect, if any, or little influence upon the inferior courts in equity when the employers go before them.

Now, our purpose in having troubled you with all this matter which is on our minds is because we feel that you are passing upon as important a question as can possibly be discussed by Congress since it was decided that traffic in human flesh and blood would no longer exist in our country. We are helpless in view of the position which equity courts have assumed. We believe that it is largely an arrogated power which they are taking over to themselves. We find no such authority as they exercise established in the Constitution. We find no statutory enactment declaring what they shall and what they shall not do. We find them setting aside what are accepted in the text books as the basic rules of equity, and they do that with impunity. We find we are at sea. We find that when we meet with an important case our attorney will say, "Well, there is a decision of the United States Supreme Court in the San Francisco Industrial case, and the court seem to hold this in that case, then there is the Bedford Stone Cutters case, and the court seems to hold that something else is the case. Really I can not tell you. I do not know." In equity decisions there is no stable ground.

That is the situation. Now, we want to know. We want to know and we want to be governed by law. We do not want to be governed by judicial discretion. Here is one of the greatest questions in this country, the social question, the economic question arising out of the

development of our American industry, and in that connection comes the question of the relationship of employer and employee. Instead of having, what should be, statutory law, something definite which every man would know, equity steps in and invariably establishes inequality of rights and of opportunities, establishes class distinctions, holding that the employer must do certain things in order that his enterprise may be successful, telling us that the doing of these same acts on our part is unsound, and "We hereby restrain it, because what you are doing is an illegal conspiracy."

If it is legal for employers to combine together to reduce wages, is it illegal for us, as the equity court opinions say, to resist that by strike? It is lawful for the employers to organize themselves and use all of the strength which the power of organization has given them to put our trade unions out of business. Case after case of that character has been presented to your committee. Then we have given you case after case in which the equity courts have said to us, "You shall not strike a single blow, you shall not make any effort to prevent the employer from carrying out his will, because in doing so you injure his business."

How about our organizations? How about our American institutions? Well, they don't mean anything, apparently, in a good many cases when the equity courts listen to the employer's side of the case.

I have troubled you longer than I intended to, but merely because we feel so deeply on this subject, and because we know from our practical experience that if we obey the injunctions which have been issued you would have no trades-union movement, because, to obey those injunctions, would have put us out of existence.

I thank you for having been so patient with me.

Senator NORRIS. Is anybody else to be heard?

Mr. MORRISON. Mr. Martin, of Seattle, desires to appear before the committee, and so far as we are concerned we have no one else to go before the committee.

Senator NORRIS. Then we will adjourn at this time until 10.30 o'clock to-morrow morning.

(At 12.40 o'clock p. m. the hearing was adjourned until 10.30 o'clock a. m. to-morrow, Wednesday, March 21, 1928.)

LIMITING SCOPE OF INJUNCTIONS IN LABOR DISPUTES

WEDNESDAY, MARCH 21, 1928

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The subcommittee met, pursuant to adjournment, at 10.30 o'clock a. m., in the committee room, Capitol, Senator George W. Norris presiding.

Present: Senators Norris (chairman) and Blaine.

STATEMENT OF WINTER S. MARTIN, ATTORNEY AT LAW, SEATTLE, WASH., REPRESENTING THE AMERICAN FEDERATION OF LABOR

Senator NORRIS. The committee will come to order. You may proceed, Mr. Martin.

Mr. MARTIN. Mr. Chairman, I should say to the committee that I appear on behalf of the American Federation of Labor at this hearing. For the committee's information, so that the members may know who I am, I will state that I am at present practicing law in the State of Washington, at Seattle, engaged in the general practice.

I was admitted to the bar in Massachusetts in 1900, after graduating from the Boston University School of Law. I practiced in the State of Massachusetts, in the courts of New York and Massachusetts until 1904, when I went West, and since then I have been engaged in general practice, except for a period of four years, when I was a member of the United States attorney's office at Seattle during the first Wilson administration.

I have engaged in general practice, but during the last few years have paid considerable attention to matters in the Federal court, particularly in the practice of maritime and admiralty law.

In this connection I have had occasion to represent, from time to time, many of the maritime unions in Seattle, and in that branch of my practice have come to represent organized labor in a sense, and to become interested in these problems.

I did not come East for this occasion. I was called to New York on other business, and while passing through Washington I was asked by the proponents of the bill to give my views upon it and to address the committee on some points that the proponents thought might be helpful.

I have examined the record, Mr. Chairman, so far introduced, and it occurs to me that I can offer some helpful suggestions in answer to the argument put forward by some of the attorneys who have spoken for the opposition. I have in mind particularly the state-

ments made by Mr. Thom, Mr. Merritt, Mr. Emery, and others, in which they have made this contention, first, that with respect to this bill, under the grant of judicial power to the United States under the Constitution, such a system of equity was contemplated as would no doubt render it unconstitutional for Congress to attempt to alter or materially change the system of equity jurisprudence which they contend was conferred upon the National Government in 1789.

They contend also that this bill would deprive the citizens of the United States in many instances of due process of law with respect to the protection of their property rights under the existing equity system.

I think that I can convince the committee that those two positions are unsound.

First, with respect to the contention that equity was so well defined in 1789 that it could not be changed or materially altered or modified, I believe the United States Supreme Court in a series of cases in recent years had made a very clear statement to the contrary, and concerning those cases I would like to call your attention to them, Mr. Chairman.

First let me suggest that these cases are cases which have to do with the grant of maritime and admiralty jurisdiction under the Constitution, but the language of that grant is identical in terms with the grant extending the judicial power to all cases at law and equity. The language of the grants is identical in phraseology.

The grant reads, in section 2 of article 3:

> The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority. * * * To all cases of admiralty and maritime jurisdiction.

You see, Mr. Chairman, the language is identically the same: "The judicial power shall extend to all cases in law and equity," and "to all cases of admiralty and maritime jurisdiction."

Now, with respect to those cases and to that grant of power, first I wish to call your attention, Mr. Chairman, to the fact that the grant was never considered really as an exclusive grant of power to the United States, for in the first Congress, notwithstanding the grant of the subject in its entirety, "The grant of judicial power shall extend to all cases of admiralty and maritime jurisdiction," in the first judiciary act they gave back to the States at least half of that power in the savings clause in the judiciary act:

> The district courts of the United States shall have jurisdiction in all cases of admiralty and maritime jurisdiction saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.

Now, if there is anything in the grant that confers exclusive power upon the United States it does not seem reasonable to suppose that the United States courts would have recognized the retransferance of that grant back to the States by the very first Congress, a grant which has been accepted and without question.

Passing from that, however, I come to the first case in which the extent of this power was seriously considered. I refer to Southern Pacific Co. *v.* Jensen, decided May 21, 1917, reported in 244 U. S. at page 205.

Jensen was injured while working on board the steamship *El Oriente* while she was moored to a pier in North River, within the jurisdiction of the State of New York. From these injuries Jensen died. His widow made claim to the workmen's compensation commission of New York for relief under the state-wide system of compensation, for injury and death occurring in the industrial activities brought under the operation of the act.

In due time the Southern Pacific Co. objected to the award on the ground that the workman was engaged in interstate commerce on board a vessel of a foreign corporation, which was then afloat upon navigable waters of the United States, and that the Southern Pacific Railroad as the employer of the deceased was still subject to a suit in admiralty by the widow of the deceased for his alleged wrongful death, and that by reason of the premises the State of New York had no jurisdiction over the cause of action or over the plaintiff company.

By appropriate pleadings the matter was brought before the supreme court of New York, which held that the exercise of power in the establishment of that special tribunal, the workmen's compensation act contemplated its exercise in a manner covering the entire boundaries of the State and within the territory of the State, notwithstanding that it reached over and included cases happening on the navigable waters of the United States within the boundaries of the State.

The State of New York held that its jurisdiction was complete over the injury, although it occurred on navigable waters of the United States.

The matter reached the United States Supreme Court, and I would like to read you briefly the comment the court makes upon the effect and force of this grant.

Senator NORRIS. Where does the Supreme Court opinion appear?

Mr. MARTIN. It would appear in 244 U. S. at page 205. This is an opinion by Mr. Justice McReynolds. He said:

> Article 3, section 3, of the Constitution, extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction"; and article 1, section 8, confers upon the Congress power "to make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof." Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law shall prevail throughout the country.

Citing Butler *v.* Boston & Savannah Steamship Co. (130 U. S. 527), and in re Garnett (141 U. S. 14):

> By section 9, judiciary act of 1789 (1 Stat. 76, 77), the district courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction; * * * saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." And this grant has been continued. Judicial Code, section 24 and 256.
>
> In view of these constitutional provisions and the Federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by State legislation. That this may be done to some extent can not be denied. A lien upon a vessel for repairs in her own port may be given by State statute, citing the *Hamilton*, where the State statute covering death cases was adopted by the United States Supreme Court.

In this case Mr. Justice Holmes read a dissenting opinion. While he approves what is said by the Supreme Court, as to the power of Congress of altering or amending the maritime law——

Senator NORRIS. Are you quoting now from Justice McReynolds?

Mr. MARTIN. No; I am just following my notes here. I have concluded now the excerpt that I had read from Justice McReynolds.

Senator NORRIS. Justice Holmes dissented?

Mr. MARTIN. Justice Holmes dissented, but in his dissent, if you please, he contended that there was no such established, well-defined admiralty jurisdiction; that the States had concurrent power at all times to deal with the subject, and that the States should be permitted to deal with the subject. He said, in effect, that while he agreed with the majority that Congress had full power to alter, amend, and in every manner control the grant of admiralty jurisdiction, it was a concurrent power that existed in the States. He points out in his dissenting opinion that the maritime law is of necessity supplemented by the applicable common law of a State, and that the State has power to regulate cases which are within the admiralty and maritime jurisdiction of a State equally with the National Government, and that the State of New York has the clear right to take jurisdiction of the claim and the relief given to Jensen under the compensation laws of the State of New York.

Three years later, Congress, having amended the section, granting, or rather defining the jurisdiction of the district courts, reserving the saving clause, saving to suitors a common-law remedy—Congress having amended that saving clause in a manner in which it was thought would give the States jurisdiction to entertain these cases before the State compensation commissions the same question, the identical question, was again presented to the United States Supreme Court. That is to say, the case of a personal injury on the navigable waters of the United States within the boundaries of a State, and they were considering the effect of the amendment of 1917.

I might say, Mr. Chairman, that in the first case, the Jensen case, the court divided in an opinion four to five, the minority were all of the opinion that the grant of admiralty and maritime jurisdiction did not give a definite system to the United States at all. They seemed to treat it as a mere reference, reserving a concurrent and existing power in the State to deal with this subject.

When the case of Knickerbocker Ice Co. came up, which is reported in 253 U. S. at page 149, the majority opinion had this to say:

> Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country.
>
> As the plain result of these recent opinions and the earlier cases upon which they are based we accept the following doctrine: The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.

Considering the fundamental purpose in view and the definite end for which such rules were accepted we must conclude that in their characteristic features and essential international and interstate relations the latter may not be repealed, amended, or changed except by legislation which embodied both the will and deliberate judgment of Congress.

Mr. Justice Holmes, in a dissenting opinion, said:

I do not suppose that anyone would say that the words, "the judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction," Constitution, article 3, section 3, by implication enacted a whole code for master and servant at sea, that could be modified only by a constitutional amendment. But somehow or other the ordinary common law rules of liability between master and servant have come to be applied to a considerable extent in the admiralty. If my explanation, that the source is the common law of the several States, is not accepted, I can only say, I do not know how, unless by the fiat of the judges. But surely the power that imposed the liability can change it, and I suppose that Congress can do as much as the judges who introduced the rules. For we know that they were introduced and can not have been elicited by logic alone from the medieval sea laws.

Senator SHIPSTEAD. Whom do you quote from there?

Mr. MARTIN. From Judge Holmes.

Senator SHIPSTEAD. He said Congress has as much right to legislate as the judges?

Mr. MARTIN. As the judges, and he probably had this in mind: He probably referred to the rules of the supreme court established in 1842, wherein they dealt, in rules 12 to 20, with the substantive maritime law, laying down very definite rules concerning the substantive law. The other part, with the rules of those mentioned, deal, of course, with matters of procedure and practice. But in those rules they went much further than the maritime law as it existed in 1789. They also went very much furtner in the decision in the *Genesee Chief* in 1840, for it was argued in that case, and Chief Justice Marshall and some of the other judges had given sanction to that argument (Judge Story had approved it), that the maritime law was as it existed in England in 1789. There it was limited to the ebb and flow of the tide, did not extend to nontidal rivers; but by the *Genesee Chief* decision they extended the admiralty jurisdiction territorially to the Great Lakes and great inland waters of the United States, simply as meeting a necessity which they saw from the fact that we had such waters and there were none such in England.

That is the meaning of Judge Holmes' argument when he says, "But, surely, the power that imposed the liability can change it, and I suppose that Congress can do as much as the judges who introduced the rules." That is to say, the maritime rules or admiralty rules.

Judge Holmes says, further:

As to the purpose of the clause concerning the judicial power in these cases nothing is said in the instrument itself. To read into it a requirement of uniformity more mechanical than is educed from the express requirement of equality in the fourteenth amendment seems to me extravagant. Indeed it is contrary to the construction of the Constitution in the very clause of the judiciary act that is before us. The saving of a common-law remedy adopted the common law of the several States within their several jurisdictions, and I may add by way of anticipation, included at least some subsequent statutory changes. I can not doubt that in matters in which Congress is empowered to deal it may make different arrangements for widely different localities with perhaps widely different needs. (253 U. S. 168.)

His idea being that it went further than to grant a system that was uniform and entire, that could not be changed. His argument was there was nothing in the grant that would prevent the States from dealing with this subject as they saw fit, and therefore the State compensation tribunal could adjudicate cases arising within the State jurisdiction upon navigable waters was a proper exercise of State authority.

Again the same question came up under another amendment in which Congress again attempted to amend the judiciary act to extend that power to the States. I refer to the case of Washington *v.* Dawson, 264 U. S. 219, wherein it is said, in the majority opinion:

> Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. * * * The granting of admiralty and maritime jurisdiction looks to uniformity otherwise wide discretion is left to Congress.

Commenting upon the increase or enlargement of power by the United States Supreme Court itself, in speaking of the Genesee chief, the court says:

> In that case the court overruled the *Thomas Jefferson*, and the steamboat Orleans *v.* Phoebus, and a doctrine declared by Mr. Justice Story with the concurrence of Chief Justice Marshall, and approved by Chancellor Kent, was abandoned when found to be erroneous, although it had been acted upon for 28 years.

The question of the extent of the maritime grant and the power of Congress over the system of maritime jurisprudence again came before the court in the Panama Railroad Co. *v.* Johnson, in which they made the identical argument that is made here, that they could not so far change the jurisdiction or the extent of the system of maritime jurisprudence to adopt, by reference, the railroad act with the remedies afforded interstate railroad employees as applicable to seamen. It was contended that they had stepped out of the range of maritime cases, had gone far afield to give us something that never was contemplated by the maritime system when it was adopted in 1789.

The committee will note that the injured seamen were given the benefit of a trial by jury and of the rules of law found in the railroad act which altered, modified, and changed the common law of fellow servant and contributory negligence.

In the Panama case against Johnson, above mentioned, the act of Congress was before the court upon the claim that it was unconstitutional for that among other things it encroached upon that system of jurisprudence contemplated by the maritime and admiralty grant of Article III of the Constitution of the United States. It was said that Congress had no right to modify or alter the maritime law so as to include legal rights which inhered entirely to another and different system of jurisprudence, namely, the common law.

The court held section 33 to be a valid enactment and that Congress had such control over the maritime law as permitted it to alter and amend it to the extent of introducing distinctive features of an act of Congress which wholly abrogated certain common-law principles which had crept into the American admiralty.

If there is anything in Mr. Thom's argument that the grant of equity jurisprudence is of such a sacred character that it can not be infringed upon, altered, or modified, then surely the grant of

judicial power in matters of law must be equally sacred, for the grant extends the judicial power to all cases in law and in equity, and equity is of no greater significance than law. You would expect that if Mr. Thom's arguments are sound Congress must pay the same respect to the judicial system known as law as it is contended it should with respect to the system of equity jurisprudence.

In looking to the administration on the law side of the court, Congress has done at all times through the history of the country as it has seen fit to do, and no one has had the temerity to urge seriously that Congress can not abolish common law remedies and substitute remedies of a different and more humane character.

The Supreme Court sustained the second employer's liability act of 1908 against this very contention, and this committee knows that the change wrought by the employer's liability act of 1908 was drastic in the extreme, for that act abolished the defense of fellow servant and the defense of contributory negligence in so far as it was a complete defense to an action. It substituted a system of comparative negligence which we believe had its origin in the civil law against the common-law system of negligence with its fundamental principles of fellow servant and contributory negligence, and when Congress now elected to introduce section 33 into the maritime law it foisted upon the maritime law not a remedy borrowed from the common law, as a distinct system of jurisprudence recognized by the Federal Constitution, but it went far afield and introduced the wholly new remedy introduced into the employer's liability act.

The adoption of the employer's liability act was a serious departure from the common-law principles as they then existed. It was so understood and intended.

Referring to the Panama case against Johnson the Supreme Court said in the majority opinion:

> The defendant objects to the statute whereon the plaintiff based his right of action as in conflict with section 2 of Article III of the Constitution which extends the judicial power of the United States to all cases of admiralty and maritime jurisdiction. Before coming to the particular grounds of the objection it would be helpful to refer briefly to the purpose and scope of the constitutional provisions as reflected in prior decisions.

The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control because of its intimate relation to navigation and to interstate and foreign commerce.

In pursuance of that purpose the constitutional provision was framed and adopted.

> Although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as explicitly investing such power in the United States. Its commentators took that view; Congress acted on it, and the courts, including this court, gave effect to it. Practically therefore the situation is as if that view were written into the provision. After the Constitution went into effect the substantive law therefore in force was no regarded as superseded or as being only a law of the several States but as having become the law of the United States subject to power in Congress to alter, qualify, or supplement it as experience and changing conditions might require.

When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion.

* * * * * * *

In this connection it is well to recall that the Constitution by section 1 of Article III, declares that the judicial power of the United States shall be vested in one Supreme Court "and in such inferior courts as the Congress may from time to time ordain and establish," and, by section 8 of Article I, empowers the Congress to make all laws which shall be necessary and proper for carrying into execution the several powers vested in the Government of the United States. Mention should also be made of the enactment by the First Congress, now embodied in sections 24 and 256 of the Judicial Code, whereby the district courts are given exclusive original jurisdiction "of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it."

The particular grounds on which a conflict with section 2 of Article III is asserted are that the statute enables a seaman asserting a cause of action essentially maritime to withdraw it from the reach of the maritime law and the admiralty jurisdiction, and to have it determined according to the principles of a different system applicable to a distinct and irrelevant field. * * *

But as Congress is empowered by the constitutional provisions to alter, qualify, or supplement the maritime rules, there is no reason why it may not bring them into relative conformity to the common-law rules or some modification of the latter, if the change be countrywide and uniform in operation.

If there is any doubt as to the soundness of this view, let us look to the law side of the Federal court, because the language of the grant—that particular grant—covers law cases as well as equity cases. Let us see how the Congress has dealt with this grant of law as distinct from equity jurisprudence from the time the Constitution was adopted.

We have 48 different States with at least 1 Federal district in each State. In some of the States there are 5 or 6 Federal districts and 2 or 3 in all of the larger States. Very few States have but 1 Federal district.

In those Federal districts—I have not stopped to count them, but at least there will probably be found to be some little over 100—you have that many varying and distinct courts of law. Congress passed the conformity act, in section 914 of the Revised Statutes, and that is where they say the practice on the law side of the courts shall conform as near as may be to the existing practice in the State court. That gives you at least 100 or more—at least that many—different Federal courts as there are Federal districts or Federal courts sitting in law.

In this large number of Federal law courts we have a system of Federal statutes applicable to all of them, and we have local statutes of 48 different States materially affecting the substantive law of those courts. And in addition we have the Federal court sitting at law adopting the decisions of the supreme court of the State as inflexible rules of law and decisions in property cases. That is to say, the Federal court of Maine, for the protection of citizens of the United States inhabitants of Maine, will follow the decisions of the highest courts of Maine with respect to legal property rights; and the Federal court in California or in any other State in the Union will do the same thing, so that on the law side of the Federal court you have one of the most complex, involved systems of jurisprudence ever created and one which has been the subject of repeated efforts to

unify and codify. This subject has been called to the attention of Congress several times.

Congress has repeatedly altered the jurisdiction of Federal courts sitting as courts of law, and has introduced new and distinct substantive features of jurisprudence into the law courts and the legal system known as law as distinguished from equity.

I think, Mr. Chairman, you raised the point yourself with respect to the denial of jurisdiction under the diversity of citizenship power, where it was originally $500, increased to $2,000, and was again raised to $3,000.

Senator NORRIS. Now, right on that point, let me ask you, suppose Congress now, taking that same statute, just wiped it off from the statute books; instead of limiting it, took it off entirely. Can there be any question about its constitutionality?

Mr. MARTIN. I do not think there would be.

Senator NORRIS. We have such a bill, doing that very thing, pending before this committee at the present time.

Mr. MARTIN. I do not think that the increase of the jurisdictional amount whereby if you wipe out the jurisdiction on that ground—

Senator NORRIS (interposing). Do you know, Mr. Martin—I have asked several lawyers this same question—whether the constitutionality of any of these acts by which that jurisdictional amount was raised at different times until it reached $3,000, was ever brought in question?

Mr. MARTIN. It never was brought in question, as far as I can find.

Senator NORRIS. It seems to me, it seems to have been admitted by everybody, that there was no question but what Congress had the right to do that.

Mr. MARTIN. I think it a fair assumption, Mr. Chairman, that Congress has that power. The language of the grant, as I view it, is nothing more than a reference to the exercise of judicial power; that judicial power may extend in law cases, that is, the power to hear and determine and adjudicate cases in that broad range of cases; the power to adjudicate, hear, and determine cases in a broad range of cases in equity, and again in that broad range of cases or limited range of cases in admiralty and maritime jurisdiction.

Now, you would suppose, if the grant of judicial power were a distinct grant of power, that the powers granted by the National Government would repose in Congress; that the States had divested themselves of power and locked it in the National Government; and, if there was a thought that courts in the States could not concurrently deal with the system of law which they then had under the common law, they would not have extended the grant of judicial power in general terms, but would have by apt language reserved the concurrent exercise of power in themselves.

Senator NORRIS. Suppose Congress had never passed an act on the diversity of citizenship question, so that there was no Federal statute on the subject. I do not suppose any lawyer would contend, would he, if he were brought into a State court where that question under a statute could be raised, that he would have the right to get out of the State court into the Federal court simply because the Constitution had given to Congress the right to legislate on the subject, which right it had never exercised?

Mr. MARTIN. I think, Mr. Chairman, under the law that until Congress saw fit to exercise it the power would repose in the State where it existed and from which it was taken. I hold to the view that generally a power that is granted to Congress which has never been used, amounts to a silent command to continue to exercise that power in that field until Congress sees fit to legislate.

Senator NORRIS. In other words, take it in a little broader sense, the Constitution specifically sets up the Supreme Court but leaves to Congress the setting up of the inferior courts.

Mr. MARTIN. Yes.

Senator NORRIS. Suppose Congress never did set up inferior courts. What would happen?

Mr. MARTIN. Why, the power would be exercised where it was originally lodged, in the States, and they would go ahead until Congress saw fit to act within its powers, but there could not be said to be any deprivation of State power merely because there was a general grant to Congress to use that power, for the Constitution is not self-operative or self-enactive. So within my understanding, and from all I have been able to read on the subject, the grant of judicial power was primarily to Congress and not to the Supreme Court. It merely said to the Supreme Court, "You may exercise the existing jurisdiction which you have in law, equity, and admiralty, subject to the power on the part of Congress to limit, define, and modify it as it sees fit," or never to exercise it, for that matter.

So I think those cases and the statements that have been made in those cases with respect to the admiralty and maritime grant may be understood with equal force to apply to the grant covering law and equity, for the language, Mr. Chairman, is the same—the judicial power shall extend to all cases in law and equity arising under this Constitution. The judicial power shall extend to all cases of admiralty and maritime jurisdiction. There is no difference in the language used, and Judge Holmes, in the very strong dissenting opinion, sees in it nothing that justifies the majority of the Supreme Court in deciding that that language necessarily contemplates the grant of a specific, uniform, and well coordinated system of maritime jurisprudence.

Judge Holmes seems to think that the power still rests in the States, because they exercised that power, were exercising it at the time the Constitution was adopted. In other words, the whole argument in those minority opinions is that it was only a mention, a general classification to which the judicial power would extend.

Senator NORRIS. Yes; but I can not help but remember that these expressions, however logical they may seem to be, all come from dissenting opinions. Now, in the majority opinion has there been anywhere, in any of them, any language used which could, by any possible construction, be construed to mean that Congress, having once conferred certain jurisdiction on courts which they have established and which they had a right to establish under the Constitution, could not by a subsequent act take it away either in part or in whole, as they saw fit?

Mr. MARTIN. They have not said that in so many words, but from the language used it must be a necessary inference, for this reason. They have looked on, in all these years, to the exercise by

the States of half of the martime jurisdiction under the savings clause contained in the first judiciary act of 1789.

Congress having jurisdiction over the whole, saw fit to give half of it back, and no one ever questioned the right on the part of the States to accept back from Congress that power and to use it, and they thereby, to that extent, cut in two, or cut down or impaired the grant in all its fullness as extended to Congress. If you take the view that Congress did have the sole authority, following the majority opinion, that Congress was invested with full jurisdiction, they gave half of it back.

Senator NORRIS. Well, in Mr. Thom's argument before this committee, to which you have been referring, and which I think you do not state with exactness, he argued that Congress did not have the right to take away this power that it had once granted, but that it still had the right to modify it and change it, although I was unable to get out of him any statement that gave one an idea as to where that line was over which Congress could not step if it saw fit.

Mr. MARTIN. I noted that feature of his testimony and your inquiry, Senator, and I saw that he did not give answer to it. I gathered clearly from what he said that Congress did have the power to increase but not to withdraw the power, once there had been an exercise of that power. But there is nothing found in any of the cases that justifies any such conclusion, and the fact that they have dealt with that power in a manner to diminish it as well as increase it, would seem to imply the power to diminish or impair it, and it was his thought that once having conferred it, it could not be substantially impaired.

Senator NORRIS. Yes; I think that is a fair statement of his contention.

Mr. MARTIN. Now they did impair that power with respect to the consent to allow the States to use half of the maritime jurisdiction in the first judiciary act, when they conferred the power upon States to deal in personam, in transitory actions between persons, to deal with all matters in maritime and admiralty jurisdiction.

Senator NORRIS. It seems to me that they have impaired it in the several acts that Congress has from time to time passed in regard to the diversity of citizenship.

Mr. MARTIN. They have impaired it in many ways. They have impaired it when they cut out a large class of cases involving between $2,000 and $3,000 which would otherwise reach the Federal courts; and if that may be done between $500 and $2,000, and $2,000 and $3,000, why might not they increase it to $20,000, and if you acknowledge the right to impair or cut down that jurisdiction so it reaches a relatively small number of people all the time, you are depriving the court of that jurisdiction.

Senator NORRIS. I think so. I have no doubt of it. In fact I did not have any doubt, and I do not think I have any now, that Congress has the right to take away anything they gave, and to take away entirely if they want to. I suppose that Congress could abolish, if it wanted to, by an act of Congress, every district court in the United States.

Mr. MARTIN. I see no reason why they could not.

Senator NORRIS. But it is contended by able lawyers, for whose opinion I have great respect, that we could not do that unless we put something in its place that substantially did the same thing.

Mr. MARTIN. If you will look at that grant you will see that they did not attempt to make exclusive the grant of law cases, because each of the States in the formation of the Union went ahead and exercised jurisdiction in law cases. They went ahead to exercise jurisdiction, and have uniformly exercised its jurisdiction in equity cases. Now, they may not use it in certain ways. In these four or five decisions which I have called your attention to they may not use it in maritime cases. That is they may not impair a uniform system of maritime law, but they still, in those cases, enjoyed the right to go into the State courts and have our cases in personam, transitory actions between persons, determined in the State courts.

Senator BLAINE. Have the Federal courts still the power in admiralty and maritime cases in which the State courts may function?

Mr. MARTIN. Yes, sir; they have.

Senator BLAINE. They still have that?

Mr. MARTIN. They still have that in those cases.

Senator BLAINE. Have you any act where the exercise of that power is permitted by——

Mr. MARTIN (interposing). The organic act was found in the first judiciary act adopted on September 24, 1789, and that has never been questioned.

Senator BLAINE. What I am getting at is this: You said that one-half of this jurisdiction in relation to admiralty and maritime law was surrendered to the States.

Mr. MARTIN. Yes; surrendered to the States.

Senator BLAINE. Do you mean by that that the Federal courts can not exercise jurisdiction in that half?

Mr. MARTIN. No; surrendered to the State concurrently.

Senator BLAINE. That is what I was getting at. But the judiciary power still remains in the Federal courts?

Mr. MARTIN. Yes.

Senator BLAINE. And can be exercised by them?

Mr. MARTIN. Can be exercised by them; but that serves to illustrate this point, I believe, that the reference to law, equity or admiralty, was nothing more than a general reference, that the power in those classes of cases may extend to those well-known subjects of the law.

Senator BLAINE. But my point is that they, having given jurisdiction to the State courts in part of the admiralty and maritime jurisdiction, still retain the judicial power, so that their power has not been impaired.

Mr. MARTIN. It would seem to impair it in this sense, that litigants have the right to go into the State courts.

Senator BLAINE. I just want to get my mind perfectly clear on it.

Mr. MARTIN. It does seem to impair or diminish that power because that is a subject that Congress has the right to deal exclusively with, because of its national character——

Senator BLAINE (interposing). But supposing that the State courts fail to exercise that power. The Federal courts then may exercise it?

Mr. MARTIN. Yes, but I do not know of any system by which the States could fail to exercise it.

Senator BLAINE. Supposing the State court just said "We refuse to entertain jurisdiction," litigants who wanted their affairs adjusted could then go into the Federal court?

Mr. MARTIN. They could still go into the Federal court.

Senator BLAINE. Or they could elect between the Federal court and the State court?

Mr. MARTIN. Yes.

Senator BLAINE. I can not see how that is an impairment of the judicial power of the Federal court. It is merely relieving the Federal court of some burden, but it does not take away from them any power.

Mr. MARTIN. No; it leaves the power untrammeled and it exists with all the force it did before, but it limits the number of cases to which it does actually extend, because half of those cases, if cases in personam, may be dealt with in the State courts. The jurisdiction is somewhat lessened.

Senator BLAINE. But it is not exclusive.

Mr. MARTIN. No; it is not exclusive.

Senator BLAINE. Then the jurisdiction is exactly the same.

Mr. MARTIN. The jurisdiction is exactly the same, but of course a large part of the business is seriously affected.

Senator BLAINE. Yes; it relieves them of a certain burden of litigation, but that in no way lessens the judicial power of the courts.

Mr. MARTIN. It does not seem to lessen the judicial power in that particular field, but they have lessened the judicial power in other ways. They have lessened it with respect to common law remedies in the second employers' liability act.

Senator BLAINE. The reason I wanted to get my mind clear on that is this, that the other side of this controversy contend that the judicial power is vested in one Supreme Court and such inferior courts as may be created by Congress; that that is a constitutional power; that judicial power is a constitutional power and can not be taken away by Congress; this judicial power being constitutional, it can not be taken away by Congress is their contention.

Mr. MARTIN. But Congress has impaired it. A specific instance, I believe, would be found in the employers' liability act.

Senator BLAINE. The word "impaired"——

Mr. MARTIN (interposing). Or diminished.

Senator BLAINE. I do not think that word "impaired" or "diminished" is sufficient. "Deprived."

Mr. MARTIN. Let us say deprived, because I think the principle is sound as applied to these cases.

Senator BLAINE. They have taken away this power, you say?

Mr. MARTIN. There is a grant in the second employers' liability act where there is an impairment of the judicial power, extending to all law cases. Now, in 1789 the state of the law was then such that the fellow servant and contributory negligence doctrine was the common law, wherein the court had well recognized those were fundamental concepts of the common law as it then existed.

Now then, as applied to a large class of persons in the United States, railroad workers, Congress, in the second employers' liability act, deprived the court of its jurisdiction to reach those common law defenses or deal with them.

Senator BLAINE. Did Congress deprive the courts of that power or did Congress merely change the extent of the law?

Mr. MARTIN. Well, that is the same thing.

Senator BLAINE. Well, it took the power away from the court because it changed the law. The common law was carried over into our Constitution and into our State constitutions. Now Congress and State legislatures have modified that common law repeatedly and in very essential parts, but that is not taking away jurisdiction. That is amending what was the substantive law that should govern in courts of law and courts of equity, admiralty and all the branches.

Mr. MARTIN. But, Senator, my point is this, that if it were not for that statute the judicial power to sit and hear and determine and rule upon the case and make a decision would, of necessity, include within the exercise of that power the right to use that common-law defense of fellow servant and contributory negligence.

Senator BLAINE. Was not that a mere right to apply the law then as they found it? The jurisdiction was to apply the law, not to make the law. Now Congress has made a law, and it is the duty of the court to apply that law instead of the common law. It is an application of the law and not the exercise of judicial power, it seems to me. I just want to get my mind perfectly clear on this, because I appreciate the very great difficulty with which we are confronted.

Mr. MARTIN. I do not seem to see, myself, any difference between the restriction upon the judicial power or the cutting down of jurisdiction, because it amounts to the same thing, because our courts, before the adoption of the employers' liability act, had carried the defense of fellow servant, assumption of the risk, and contributory negligence to such an extent tht law writers and philosophical writers and people interested in the subject complained bitterly of the defense of fellow servant in a large class of cases constantly arising in industrial relationships, and that was the remedy they applied to correct it, to deprive the railroad of the defense of fellow servants, and of assu ption of the risk and of contributory negligence, and they cut down the jurisdiction and, incidentally, there went with it a deprivation of judicial power for whereas before that they did pronounce judgments; that is, the courts deal with the subject judicially. The court said, "The rule of fellow servant is a complete defense." "There is in this record evidence which convinces us that the case should have been taken from the jury because of the doctrine of the fellow-servant rule."

Now they can no longer do that, and jurisdiction was seriously diminished, or, stating it more accurately, judicial power was diminished.

So that the burden of my argument on that, Senator, is this, that there was not such a definite system contemplated in the grant of the judicial power but what Congress had at all times full control over the subject as such, whether it be law, equity, or admiralty, and, as applied now to the bill in question, Congress has the power to limit the functions of a court of equity, and in a certain class of cases to deprive it of the injunction power.

Now, in that sense it might be admitted that to cut down the judicial power is to cut down the jurisdiction, but it amounts to the same thing.

Senator BLAINE. It seems to me that the judicial power falls into two classes. In one class of cases it is vested in the Supreme Court and our inferior courts that arise under the Constitution, that are in the Constitution, expressed, not implied, not inherent, but expressed powers within the Constitution, and then such other power as may be provided by the laws of the United States. Now, that is one class of judicial power.

The other, then, is with respect to treaties and affecting ambassadors, cases of admiralty and maritime jurisdiction, controversies in which the United States is a party, controversies between two or more States, between a State and citizens of another State, between citizens of different States. You have the class of cases arising under the Constitution, and under the laws of the United States, so that you can change the substantive law and restrict the judicial power by the administration of that law.

Mr. MARTIN. I think you undoubtedly can, and it seems to me that the whole matter is found in that one sentence. The judicial power shall extend to those cases, but it does not say that Congress must exercise that jurisdiction.

Senator BLAINE. Oh, no: Congress has discretionary power. It may do away with all the inferior courts and leave this burden upon the Supreme Court.

Mr. MARTIN. Because the language is, without referring to the verb again "to controversies in which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States."

Senator BLAINE. That is a constitutional power. We can not take that away from the courts, as I understand it.

Mr. MARTIN. Well, it seems to me that the judicial power merely extends to them, but that if Congress did not see fit to exercise that jurisdiction it would remain in the States.

Senator BLAINE. There is no State that authorizes a citizen to sue the United States.

Mr. MARTIN. No.

Senator BLAINE. Nor to sue a citizen of another State. I mean a citizen of another State in the jurisdiction of his State. They can sue him within the jurisdiction, if they can get personal process.

Mr. MARTIN. Yes. If Congress did not exercise that power then there would be no jurisdiction to entertain controversies between citizens of different States.

Senator BLAINE. The court would establish its own rules of procedure under the legislative act when they have the judicial power with respect to that class of cases. Then they have the judicial power with respect to that class of cases arising under the Constitution and arising under the laws of the United States. That is another class.

Mr. MARTIN. Then I think that your argument would be, Senator, that to some extent, at least, the Supreme Court and the Federal

courts, such as might be created from time to time would, without any law, have the right to determine cases in law and equity.

Senator BLAINE. With respect to those cases——

Mr. MARTIN (interposing). With respect to those powers.

Senator BLAINE. Other than those cases arising under the laws of the United States. They can only exercise that power in applying the law as it exists, and if Congress did not pass any law on the subject, they would apply the common law.

Mr. MARTIN. It may be that you are right, sir, in that particular, but I can not see that that would, in this particular case, interfere with the operation of the proposed law, because there is no purpose to deprive the Federal court of all power in equity cases.

Congress merely deals with this power, alters, amends, and limits it, as it has done with the grant of admiralty and maritime jurisdiction, and in that, from what the courts have said in the cases which I have cited, there would seem to be a clearly recognized power to alter, modify, extend, diminish, or increase or decrease, as they saw fit, and the reference to law and equity in this class of cases is a very broad general grant.

Now, taking up the next consideration, it is said with respect to the bill that it amounts to a deprivation of property without due process of law, and it is said that Congress can not define what property is, for in attempting to define what property is there is a deprivation of property without due process of law. To us it seems that the bill does nothing of the sort. There is no effort to deprive citizens of the United States of what was termed or understood to be property at the time the constitutional amendment concerning the deprivation of property without due process of law was passed. In other words, the only limitation that would be found under the due-process clause would be in the fifth and the fourteenth amendments.

That calls for consideration of what property was—what property was understood to be when the Constitution was adopted and again when the fourteenth amendment was adopted.

Coming more recently to the fourteenth amendment, there was at that time no thought that these things which since have become to be regarded as property were at that time property, the right to labor, the right to engage in business, which we believe we can show this committee are not property rights and were never considered or conceived to be property rights prior to about 1890; that when the constitutional amendment was adopted in 1868, in the fourteenth amendment, in 1869, at that time they had just passed the thirteenth amendment in which they had said that involuntary servitude should not exist in the United States, and there was no longer any property right in a person's labor. They had fought a great war to determine that question.

There was no longer any right of property in persons or in the labor of persons.

So the proposed law can not be said to controvene any constitutional power with respect to a large number of things that they now call property, for property, in 1868 or 1869, did not cover human labor. There was no property in it. And the only way that this law can deprive persons of their rights so as to amount to a deprivation of property without due process of law would be under the fourteenth and fifth amendments. There is nothing said in any other

part of the Constitution about it. Congress would have the right to make such definition, except as limited in those two particulars, as it saw fit.

Now, the right to define has at all times been of the essence of legislation. The power of defining the subject over which legislation was about to apply has been exercised a great many times. You will find in a great many bills that have been passed that certain things shall be defined as so and so. They have done it repeatedly, and continue to do it. So that the power to define that which you are dealing with seems to be a characteristic of legislation itself, and it can only be criticized when it comes into sharp conflict with definite provisions of the Constitution.

Now, Congress could not by any law so define property as to say that my house and lot shall not be deemed to be property, and thereby deprive me of it without due process of law, because houses and lots are physical, material property, were considered at the time the fourteenth amendment was adopted to be property, and it was that class of property that the fourteenth amendment was designed to protect; but it was not designed to protect the right to labor or to protect incorporeal, intangible, and vague floating rights which did not constitute property. And I think I can show the committee that the concept of property itself is a new thing, and the courts, up until about 1890, did not consider or deal with human labor as property, and that doctrine that the human labor is property was injected into the judicial system in equity for the purpose of protecting it by injunction.

In this respect, and from this point, before proceeding further with the argument, I have to suggest that the author of the bill and its proponents, after conference and due consideration, authorized me to say that in our judgment the bill may be amended by the committee if the committee sees fit in these particulars: That the word "and" may be stricken out and the word "or" substituted, so that the bill shall now read "tangible or transferable" instead of "tangible and transferable." As it now reads both of those qualities would have to be found in the subject itself, but if we interpose the word "or" in place of "and" then you reach a class of property, first, tangible property, and, second, that class of property which, not being tangible, it still transferable, and if that is done I think that the bill would exclude from its operations all those vague, indefinite, indeterminate rights which are at the present time within the reasonable reach of a court of equity by injunction. In other words, in that class of cases you have the right to labor, the right to do business; you have a number of vague, incorporeal and intangible things; but if a right exists in all its fullness so that it may be transferred, is capable of transfer, it would be reached in this bill, and would be protected by injunction even if it were not tangible, and I think if that amendment were allowed it would cover patent cases and copyrights, trade-marks, and a large number of cases where there may be a distinct property right which should be protected.

Senator BLAINE. That is transferable?

Mr. MARTIN. Yes; transferable but not tangible. That would cover patents, copyrights, trade-marks. There is such a distinct

right in a registered trade-mark that the court recognizes its transferability. The courts commonly recognize the transfer of choses in action by instrument in writing; a transfer of chose in action so as to bring in a person not the original owner of that chose in action, who may sue upon it. It is not physically transferable. You can not pick up my debt to you and say it is tangible, because it is not.

Senator BLAINE. But it can be assigned.

Mr. MARTIN. It can be assigned, and it is inheritable, because it falls within the range of personal property that comes under the authority of administrators and executors of one's estate.

And so just the change of that word from "and" to "or" it seems to me eliminates any possible criticism on that ground, and so amended it will reach a class of property that should still receive the attention of courts of equity in proper cases to protect by injunction, and it would eliminate from that class of cases this definition that has crept into the decisions in dealing with these labor questions. It would eliminate jurisdiction, then, of a court of equity over human labor and the right to withhold it at will.

I have searched the range of the law with respect to the incorporeal hereditaments at common law, various future estates, contingent rights. I can conceive of no right recognized at common law which does not possess the quality of transferability or of tangibility.

Senator BLAINE. Except torts?

Mr. MARTIN. Sir?

Senator BLAINE. Except torts?

Mr. MARTIN. And when you come down to torts, the test of the transferability of actions in tort, the assignability of the tort is, does it descend to the heirs at law? If it does not, it is not such a property as would be transferable.

If I have suffered a distinct loss of my property by the encroachment of the unrestrained waters of my neighbor who has permitted them to go upon my land or, by his conduct, in committing some act that would constitute an encroachment on my extralateral rights, or in injuring my property in any way, the essence of which is a tort or trespass that descends now to the administrator or executor, that kind of a tort is well recognized to be assignable and transferable.

But the tort of slander and libel, the vague, indefinite tort, the personal right, the injury to the person, assault and battery, and things of that sort, are not assignable, because they are not capable of transfer or assignability. They are not tangible. When you come to the economic need for the existence of injunctions, there is no reason why the injunction should be held to protect any such right. They are not commonly protected now by injunction. The only vague and intangible rights that are now protected by injunction are these labor rights of that sort. In labor cases it is issued because the right to the earnings from labor is considered as a property right which should be protected at any cost by injunction.

Senator BLAINE. By the persons named.

Mr. MARTIN. Yes.

Senator BLAINE. Not by a general situation.

Mr. MARTIN. No.

Senator BLAINE. But by the persons named.

Mr. MARTIN Yes.

So that you will not do anything economically wrong when you deal with that class of cases by depriving them of the right to issue an injunction against them.

Senator NORRIS. Would not this still extend even to some of those rights that would not descend upon the death of a person?

Mr. MARTIN. The bill, if you permitted that amendment, the substitution, sir, of the word "or" for "and," would not extend the protection of the injunction to anything that was not a definite right and capable of being transferred.

Senator NORRIS. However, it would cover a patent right?

Mr. MARTIN. It would cover a patent right. It would cover all such rights that have a distinct property value and that have always been recognized as a species of property. You would clear up all the objections to the bill on that score, that it did not reach and protect property. The only thing it would not protect would be the right to human labor, or the right to the increment derived from labor. It would not reach a certain class of intangible and untransferable rights, or rights that can not be transferred; but as to all existing property rights capable of transfer, like the transfer of a chose in action, the sale of a debt, even though the debt be not reduced to writing, the sale of open accounts of a debt or claim, a chose in action, it could be transferred, because the law permits the transfer in every State in the Union of claims of that character. So that that eliminates any possible criticism on that score.

Then we have to suggest also the further amendment that the word "adequate" should be written into the statute so as to read "equity courts shall have jurisdiction to protect property when there is no adequate remedy at law."

Now, the reason for that is twofold. First, the ancient jurisdiction in equity seems to depend upon that, and the adequacy of the remedy at law has always been a test, even back in the days when the chancery system was flourishing at its height in England, and under the adoption of the judiciary act in 1789 we included in section 16 this clause which has been carried into the judicial code in existence to-day, "suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, complete remedy may be had at law."

In other words, as early as 1789, by statutory enactment that thought was carried forward into the law, that there could not be resort to equity if there was an adequate remedy at law.

Senator NORRIS. Suppose we made these changes as you have suggested, and we passed this law with a view of preventing injunctions in labor disputes, would it not be very easy for attorneys preparing a bill of complaint, the object of which was to secure an injunction in a labor dispute, to make the allegations that the result of the conspiracy which they would allege would be to injure the physical property, and get an injunction, and would it be effective if they wanted to accomplish that purpose?

Mr. MARTIN. I think probably it would, but it would always depend, then, upon the proof, and certainly no court would entertain an injunction unless there was proof of pending and immediate injury to the physical property of the plaintiff. There is no purpose now to deprive the court of equity of the proper protection of property—

property in its true and proper sense. Labor unions would still be within the control of the courts of equity to guard against attacks upon property, the improper destruction of property by force and violence of that character, but it would not reach the cases which have grown up under the present system in the last few years, such as the Bedford Stone Cutters case or the Duplex Printing case, which I shall discuss in a few minutes.

Another reason for the inclusion of the word "adequate" is because undoubtedly the courts would read that term into the law anyhow, because a remedy can hardly be said to be a remedy which is not adequate.

Senator NORRIS. I might say, just for the purpose of saving time, I do not believe that it is advisable to take much time on the discussion of inclusion of the word "adequate," if we report out the bill, because I think that it is generally conceded it should be included. I do not know that it would add anything to it, because I am inclined to think it means that without the word "adequate."

Mr. MARTIN. I think so. It would be understood.

Mr. WILLIAM B. WILSON. Mr. Chairman, may I ask a question?

Senator NORRIS. All right.

Mr. WILSON. This says where a remedy at law has been provided, and does not that carry with it an implication that the law-making body has provided a remedy?

Mr. MARTIN. I think it does.

Mr. WILSON. And if the lawmaking body has provided a remedy, must it not be inferred that the lawmaking body has provided a remedy, must it not be inferred that the lawmaking body has provided what in its judgment was considered an adequate remedy?

Mr. MARTIN. No; because there, I think, you infringe upon the judicial power to determine whether the remedy is adequate as suited to the particular facts before the court.

Mr. WILSON. Well, when the lawmaking body acts in providing a remedy it provides a remedy that in its judgment is adequate.

Mr. MARTIN. Yes.

Mr. WILSON. If the lawmaking body provides a remedy that in its judgment is adequate, and the lawmaking body has dealt with it on that basis, why should the court have the right to step in and say what is an adequate remedy?

Mr. MARTIN. The answer to that is this: That the lawmaking body in enacting a law can not cover minutely the varying situations of life. That was the origin of courts of equity, because of the rigid, unelastic character of the common law.

The common law, finding a state of facts, rigidly applied its remedies, which the equity court said were unconscionable, such as the laws covering debt, replevin, and so on. If persons brought themselves within that remedy, all right, they got that; but if there was a drastic or a great wrong or damage which followed from the operation of the law itself, in the recognition of fines and forfeitures, equity would relieve against that situation because it was against the conscience of persons that the law should exact its pound of flesh. In other words, the law is rather unelastic and can not be made to fit so many minute situations of life.

Senator NORRIS. There has been considerable discussion about this word. To my mind that is not very material, because I think it

would mean the same with it as without it. It has always been in all acts that I know of in regard to remedies that existed by law that would prevent the issuing of injunctions. If it is a remedy at all, to my mind, it is an adequate remedy.

Mr. MARTIN. Yes.

Senator NORRIS. In other words, if adequate is not there you would find that you would not go out and spin a fine thread to show that there is a possibility here that there might be a remedy, or a possibility there. It seems to me the court would hold, and it ought to hold, that the remedy to be such as to compel a person to go into the court of law, would be a remedy that had sense to it—that meant something; in other words, that was a real remedy.

Mr. MARTIN. Yes, sir.

Senator NORRIS. A practical remedy.

Mr. MARTIN. But it would do no harm to include it.

Senator NORRIS. I do not think so. It would take away a lot of objection, it seems to me. To my mind, it is there anyway.

Mr. EMERY. Mr. Chairman, might we make an inquiry?

Senator NORRIS. Yes.

Mr. EMERY. May I ask the gentleman if the bill is amended in accordance with his suggestion, would it have prevented the issuing of the injunction in the Duplex Printing case?

Mr. MARTIN. I think it would. I propose to discuss, if the chairman will bear with me, the operation of the court's decision in the Duplex Printing case and in the Bedford Stone case, because the Bedford Stone case has gone much further than the Duplex case, and with respect to those cases to call the committee's attention to the fact that the decision must inevitably rest upon the assumption that labor is property, and this bill will take out of the operation of the law any such concept of property. And that calls my attention to this.

We further would like to amend this bill to include in the repealing clause the reference to the Sherman Antitrust Act, and it may be there should be a reference to sections 6 and 20, and possibly some other sections of the Clayton Act. In fact the whole Clayton Act should be repealed, in our judgment, and also section 4 of the Sherman Antitrust Act.

The law, as we would like to have it amended, would read:

> And section 4 of the Sherman Antitrust Act approved July 2, 1890, together with all laws or parts of laws in conflict herewith, are hereby repealed.

We have included section 4 of the Sherman Antitrust Act specifically because of the part this section has played in some of the recent cases in the Supreme Court of the United States, to which I will call the committee's attention.

Senator NORRIS. Suppose there was nothing said about it? Suppose that repealing clause was stricken out entirely, and we said nothing about it. What then?

Mr. MARTIN. The law might fail in its effect because of the situation which the Sherman Act as aided by the Clayton Act has brought about.

Senator NORRIS. You know what difficulty you are pushing us into if you should persuade us that is what we ought to do, when we ask Congress to repeal the Sherman Antitrust law and the Clayton Act.

Mr. MARTIN. Only section 4. I can show you, Mr. Chairman, that the Clayton Act is worthless.

Senator NORRIS. That may be, but you are saddling us with an obligation to do the same thing before the Congress, which I doubt very much if we can do.

Mr. MARTIN. I can show you, Mr. Chairman, not in my own language, but in the language of Mr. Spelling, in the work of Lewis and Spelling on Injunctions, a memorandum prepared by him, in which the whole vice of the Clayton Act stands revealed so clearly that there can be no lingering thought in the mind of this committee, when they examine that carefully, as to the necessity of repealing that act.

Now, in repealing section 4 of the Sherman Act, that only relates to the use of the injunction. There is still left all of the remedies under sections 1, 2, and 3. It is still a crime to do those things. The criminal prosecution of unlawful combinations and action at law is preserved. Section 4 would merely abolish the right to resort to a court of equity in those cases. The reason we refer to that is because the law, prior to the adoption of these acts, did not contemplate the issuance of an injunction in a case where the combination was for a lawful purpose by persons who had a self interest in the controversy.

I think the case of Mogul Steamship Co. *v.* McGregor, one of the English cases, of 1850, a rule of law laid down by the House of Lords, fairly expresses the condition of law before this theory of labor being property crept into the modern law in the United States.

This case is reported in appeal cases in the law reports for 1892, before the Privy Council, House of Lords, in England. The case, Mogul Steamship Co. *v.* McGregor, is a very long case. I will only read the syllabus if I may.

Owners of ships, in order to secure a carrying trade exclusively for themselves and at profitable rates, formed an association and agreed that the number of ships to be sent by members of the association to the loading port, the division of cargoes and the freights to be demanded, should be the subject of regulation; that a rebate of 5 per cent on the freights should be allowed to all shippers who ship only with members; and that agents of members should be prohibited on pain of dismissal from acting in the interest of competing shipowners; any member to be at liberty to withdraw on giving certain notices.

The plaintiffs, who were shipowners excluded from the association, sent ships to the loading port to endeavor to obtain cargoes. The associated owners thereupon sent more ships to the port, underbid the plaintiffs, and reduced the freights so low that the plaintiffs were obliged to carry at unremunerative rates. They also threatened to dismiss certain agents if they loaded the plaintiffs' ships, and circulated a notice that the rebate of 5 per cent would not be allowed to any person who shipped cargoes on the plaintiffs' vessels. The plaintiffs having brought an action for damages against the associated owners alleging a conspiracy to injure the plaintiffs:

Held, affirming the decision of the court of appeal, that since the acts of the defendants were done with the lawful object of protecting and extending their trade and increasing their profits, and since they had not employed any unlawful means, the plaintiffs had no cause of action.

In other words the courts recognized at the common law that where the persons had an interest in the controversy for their own protection, for their own profit and gain, they had the right to combine together to deprive another person of his business in competition with them. They could not destroy his property physically; they could not combine and conspire to commit physical injury upon him

and his employees, but they had the right to send out the warning notice, they had the right to combine together and exclude others from the benefit of the regulations which they were adopting for their own protection and benefit, and if the necessary results of this combination and conspiracy was to deprive him of his business so that he lost a great deal of money, he could not complain, because they were exercising a legal right of combination, and it was only when the courts began to recognize the right to employ labor at a profit as a part of a business as a going concern, and the increment from labor as a property right—it was only when labor itself was treated as property that they conceived the idea of extending the injunction to such a property right, and this bill will correct that.

I will file a memorandum, Mr. Chairman, covering the essential features of my argument, so that the committee may have it in addition to what I have said before the committee.

Senator NORRIS. Mr. Martin, assuming that we want to bring about the same conditions that existed in that case you cited, could we not reach the same thing be defining labor, and saying positively that it is not a property right, that the labor of a person is not a property right?

Mr. MARTIN. May I answer that by reading from Lewis and Spelling, the author's view of the necessary effect of the Clayton Act, and then call your attention to expressions of the Supreme Court of the United States in the Bedford Stone case and the Duplex Printing case? There is an extended note here of three or four pages, but I would like to read it to you if you would allow me the time.

Senator NORRIS. All right.

Mr. MARTIN. It may take an hour to do it.

Senator NORRIS. I probably will not be able to be here an hour. I think I will. Perhaps we can run on for another hour, unless something happens on the floor of the Senate that makes it necessary for me to leave.

Mr. MARTIN. I will give you the authors' views because they set forth, Mr. Chairman, so clearly the vice of section 4 of the Sherman Act and sections 6 and 20 of the Clayton Act.

Senator NORRIS. I do not like to disagree with your doing that, and I am not finding fault with your argument, Mr. Martin, but as a practical proposition, if you convince the committee that that is what we ought to do you have started us on a job here that, in my judgment, we can not accomplish. I do not believe it is possible to repeal the Sherman Act and the Clayton Act. Congress will not do that, in my judgment. They may be wrong about it. They may, in time, come around to that. Maybe your point is right, but if we want to accomplish something of a practical nature, it seems to me we ought to find some other way to do it if it is possible.

Mr. MARTIN. I realize, Mr. Chairman, the great difficulty of doing that, and the song of protest that would sweep the country if there was an effort to disturb the Sherman Act. But we have referred specifically to section 4, the use of the injunction in those cases, because we believe——

Senator NORRIS (interposing). Well, why can we not, if we think the injunction has been abused, reach the question by providing specifically that in certain cases injunctions shall not be issued, and

put it in language that will be general so that we will prevent its abuse, if we find it has been abused in the past.

Mr. MARTIN. It may be in this present form sufficient, because there is a provision in the law that it should be deemed to be a repeal with respect to all acts inconsistent therewith, and surely any proper interpretation of the law would contemplate a repudiation of decisions rendering inoperative, at least, sections in conflict with this law; but we thought it would strengthen it to include that.

But the vice of this Clayton act in sections 6 and 20 is so great and is, I believe so clearly here set forth, that I think the committee should have it for what it is worth, if I may read this to you.

Senator NORRIS. All right.

Mr. MARTIN. This begins at page 272 of this volume, the Law of Injunctions, by Lewis and Spelling, published in 1926.

It will be noted that the prevention of injuries to trade or business relates largely to conflicts between industrial classes; that is, between those having capital invested in productive enterprises, usually designated "employers" and those receiving wages as participants in productive industries, usually designated "employees." A volume could be devoted, and in fact volumes have been written on the subject, under appropriate titles, dealing alone with labor law, the most important phases of which relate to the use of injunctions in labor disputes. But any intelligent discussion of the use of injunctions in labor disputes involves searching investigation and exposition of law governing conspiracy, the antitrust act, common law restraining of trade, and the rights, powers, duties, and liabilities of organized labor. An examination of the cases cited in this chapter (8) and chapter 1 would disclose such advances and extensions of judicial power and examples of its exercise as should cause widespread alarm among all labor organizations, according to labor's theories on the subject. The Clayton act, upon its passage, was widely acclaimed to be the most important legislation in all history, its sixth section as a "new freedom" or "new magna charta," and its twentieth section as "labor's bill of rights." All of which was at variance with the facts and contrary to the views of those who had advocated real legislative relief, session after session, for several years.

I will leave out some parts of this, to cut it down somewhat.

The methods, forms, and directions in which expansion of judicial power has been accomplished can be readily learned by studying the decisions synopsized under the various section heads of this chapter and chapter 1. It will be seen that the protection of mere business privilege by injunction which was first judicially undertaken 25 years ago to safeguard, at all hazards, a business in its entirety as a going concern has been recently extended indiscriminately to all the incidents and ramifications of business activity, as well on the streets and highways as on the premises where the business is transacted. Not only so, but the things that a labor organization may do, in furtherance of a trade or labor dispute, have been obsoleted as a legal question and made the subject of judicial discretion; that is to say, of judicial opinion. For instance, while it was conceded in what is known as the Tri-City case (American Steel Foundries v. Tri-City Trades Council, 257 U. S. 184), that the Clayton Act exempted peaceful persuasion from injunctive inhibition, yet it was held there could be no such thing in legal sense as lawful picketing. And following that line of reasoning, the court assumed to prescribe just what strikers could and could not do in furtherance of a strike. They might provide facilities for the acquisition of information and for "peaceful" persuasion; that is to say, they might station just one man near each point of entrance to and exit from the works; but that one man must conduct himself peacefully, according to the court's understanding of the term. In other words, the court then and there assumed complete powers of regulation of the conduct of the participants in trade disputes, which is none other than the exercise of legislative power. But those responsible for the Clayton Act, or who hailed its passage as a wonderfully progressive step in labor's interest can not now consistently condemn the courts for such decisions as that in the Tri-City case and similar cases.

The act appears to be fatally defective in definition. Since it contains no definition of the words "peaceful" and "peacefully" the construction or definition of these terms was obviously and necessarily imposed upon the courts. It became necessary for them to determine in each case as it arose whether the acts or course of conduct complained of came within or was excluded from the trivial limitations upon the judicial power in the matter of issuing injunctions. In this respect the act of the Illinois Legislature, in 1925, is meritorious as compared with section 20 of the Clayton Act. In effect, it defines and legalizes persuasion by a process of exclusion, the only persuasion excluded being that characterized as or accompanied by threats or intimidation. The proponents of the Illinois act had the good sense not to insist upon the insertion of the word "picketing" or even "peaceful picketing." They were content to get the substance without cavilling about the name by which it should be designated. The New Jersey act of 1926 is copied from it.

IT EXPANDS JUDICIAL POWER

But the Clayton Act, either by express terms or by essential implication opens the way and sanctions the most drastic and sweeping injunctions anywhere or in any case issued by the courts since its enactment. This is in part due to the use of the term, "property right" after the word "property" in the twentieth section, without defining and limiting the words, "property right," and in part to the express language used in section 17. By omitting to define these words, it was clearly left for the courts to include within the definition of property right, not only good will of business and other intangibles, that had been immemorially held entitled to injunctive protection, but the right to do, carry on, and continue business, as well as such incidental and adjunctive rights as went along with the transaction of business, anywhere and everywhere.

The seventeenth section of the Clayton Act has the deceptive form of a regulation of notice in injunction cases. But the question of whether or not an injunction in a proper case for injunctive relief shall be preceded by notice to the parties proceeded against is one in which labor never had any special interest, and the highest authorities in the labor movement, prior to the Clayton Act, expressly conceded before the committees of Congress that, if a party is entitled to an injunction at all, he should have it issued and served before the other party hears of his application and is thus given an opportunity to do the mischief before being restrained. Nevertheless, we have in the Clayton Act a section which reads:

"SEC. 17. That no preliminary injunction shall be issued without notice to the opposite party."

Senator NORRIS. Well, what does he say about that? They do issue them without notice, and if they disregard that law will they not disregard any other law?

Mr. MARTIN. They issue them without notice because of the restraining order.

Senator NORRIS. The law says they shall not issue them without notice.

Mr. MARTIN. To continue what the authors say:

"No temporary restraining order shall be granted without notice to the opposite party, unless he shall clearly appear from the specific facts shown by affidavit or by verified bill that immediate and irreparable injury, loss, and damage will result to the applicant before notice can be served and a hearing had thereon." By this language, Congress says to the courts and judges: "(1) You can not issue a preliminary injunction at all without notice. (2) But just change the name of the same thing, and call it a temporary restraining order—" Now, mark what follows the substitution. "Unless it shall appear * * * that immediate and irreparable injury, loss, and damage will result to the applicant before notice can be served and a hearing had thereon."

Senator NORRIS. That has always been the law, before that.

Mr. MARTIN. Except that in the old law before that the irreparable injury, loss, and damage was to property, and it now reads "irreparable injury, loss, and damage," without consideration of

any property, as long as damage results to you from this combination which is set up, damage to income or whatever it may be, because there is no reference to property included in that definition.

Thus an exception is introduced by the word "unless," covering a wider field of sanction for the judges than was ever claimed by or for them prior to the Clayton Act. No one ever asked the issuance of a temporary restraining order, or any form of injunction, or injunctive interference, "unless to prevent some form of immediate and irreparable injury, loss, and damage." It should also be noted that a restraining order is almost invariably the forerunner of an injunction, and is just as broad and effective. It usually does the business for the person or corporation applying for it in a labor case. Seldom does any hearing follow it in such a case, with reference to the propriety or impropriety of a final order.

But there is a bigger joke in this seventeenth section than that just mentioned. After the word "damage," there is not, as in all reason and fairness there should be, the words "to property or property rights." Stating it according to its legal effect, the section says to the judges: "You may issue the order and follow it up with an injunction, not merely to protect property or property right, as theretofore, but now you may issue it in favor of any one who presents the requisite affidavit or verified bill setting forth that he is about to suffer immediate and irreparable injury, loss, and damage, in any way."

Many erroneous statements and much misleading and harmful propaganda have been promulgated concerning the provisions of the Clayton Act on the subject of jury trial in contempt cases, a subject closely related to injunctions. While, correctly speaking, labor classes have no more interest in the matter than others, yet the Supreme Court decision upholding constitutionality of this trivial regulation of procedure in the Michaelson case (266 U. S. 42) has been widely advertised by interested parties as a notable triumph for labor and a justification for the legislation. And it is entirely proper, in a work devoted to the general subject to discuss these provisions of the act and their meaning of the only decision by the United States Supreme Court (reversing the lower court) on the subject.

These sections of the act then before the court are not labor provisions at all, in any proper sense, but general law, enacted as amendments to the judicial code of the United States.

It has been also starkly stated that the court held in the Michaelson case that the relation of employer and employee is not severed by a strike, for the purposes of the act. But the relation of employer and employee is not mentioned in the sections we are now discussing, but only in section 20, which deals with injunctions in labor disputes. And the court called attention to the fact in disposing of an argument presented in the case, but otherwise did not discuss the question of whether the relation of employer and employee is severed by a strike.

The Clayton Act (secs. 21–26) deals with the whole subject of contempt, jury trials being one of the details. The first section (21) limits the entire act to contempts "of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the acts was committed." Section 24 contains exceptions, is so comprehensive and explicit as to justify its insertion in full. It reads as follows:

"That nothing herein (in the whole act) contained shall be construed to relate to contempt committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of the United States, but the same, and all other cases of contempt not specifically embraced within section 21 of this act, may be punished in conformity to the usages at law and in equity now prevailing."

That rules out from the benefit of jury trial all alleged contempt cases that can arise in a labor dispute, with rare exception, in the Federal court; and of course the act has no applicability to the State court. In the first place, no jury trials are permitted where the act or conduct alleged to constitute the contempt was in the presence of the court or so near thereto as to obstruct the administration of justice. And since there is no definition or delimitation the question of whether the act or conduct obstructs the administration of justice is one which the court is here empowered to decide for itself. And this takes out of the privilege of the act a large and indefinite class of cases regardless

of whether a statute has been violated, and regardless of whether or not the United States is interested in the litigation in the course of which the contempt is alleged to have been committed.

Then there can be no jury trial in the cases of "contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of the United States."

Now, to realize the scope of this withdrawal of the benefit of jury trial, let it be noted: (1) That the injunction is the only civil remedy to the government under the antitrust act. (2) It is not settled by the Debs case and by the recent railroad shopmen's strike case that the United States has capacity to become a complainant in an injunction suit in all railway strike cases. (3) Contempts "committed in disobedience of any lawful writ, process, order, rule, decree, or command entered" covers all contempts chargeable in such cases. This exception is susceptible of almost limitless expansion by judicial construction.

The right of the Government to sue in railroad strike cases having been now firmly established, no more suits by individuals, or even combined railroad companies against strikers need be expected. Invariably, it will be seen, the Government will be appealed to on a plea of protecting wide public interests. Under the cloak of authority afforded by the decisions just referred to, Federal officialdom is sure to yield to the demands thus made upon it.

We now proceed to the class of cases in Federal courts—still bearing in mind that the Clayton Act is inapplicable elsewhere—to which the provision for jury is applicable. In the first place, it must be a suit between private parties. In the second place, the act or conduct constituting the contempt must likewise "be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed."

The most important inquiry is as to what acts and conduct ordinarily give rise to charges for contempt in labor disputes. With exceptions so rare that they may be almost designated as accidental, they are not "of such character as to constitute also a criminal offense under" etc. No Federal statute penalizes boycotting, picketing, persuading, threatening, paying strike benefits, and the like, and there is probably not in the Union another State than Wisconsin where such acts are penalized by statute. And it was within the territorial jurisdiction of the Federal court for the district of Wisconsin that the act was done which was held to constitute contempt in the much talked about and written about Michaelson case, wherein the Supreme Court held the lower court erred in refusing, upon demand therefor, to award the contemnors a jury trial, under the Clayton Act. Therefore, it is entirely proper to say that the labor cases covered by the so-called jury-trial provisions of that act will be of such rare occurrences as to be almost accidental.

To see the scope and breadth of the exclusion effected, and the narrowness of inclusion of the so-called jury-trial provisions of the Clayton Act, it is only necessary to glance at a few cases. John Mitchell and others were charged with contempt in the Hitchman Coal case in West Virginia. (Hitchman Coal & Coke Co. *v.* Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260; Mitchell *v.* Hitchman Coal & Coke Co., 214 Fed. 685, 131 C. C. A. 425.) The alleged contempt consisted in persuading nonunion coal miners to join the union in violation of their contract with the mine-owning employers. They could not have had a jury trial because there was not then nor, for that matter is there to-day, a West Virginia statute penalizing persuasion. The individuals charged with contempt in Buck's Stove and Range Co. *v.* American Federation of Labor (see Gompers *v.* Buck's Stove & R. Co., 221 U. S. 418), could not have had a jury because there was no Federal statute against boycotting, nor any State statute penalizing the boycott in any State where it was charged that the violation of the injunction occurred. And the same is true of the case of Duplex Printing Co. against Deering (254 U. S. 443). And many other cases that could be mentioned, the litigation being between private parties. None of the acts charged as contemptuous in the "Palmer" injunctions against the coal miners in 1919 could be submitted to a jury because the Government was a party. And the same is true of the "Daugherty" injunctions against the railroad shopmen, in 1922, and for the same reason.

These statements with respect to the small scope of the requirements as to jury trials finds full confirmation in the Michaelson case. The Supreme Court said: "It is of narrow scope, dealing with the single class where an

act or thing constituting the contempt is also a crime in the ordinary sense." The court then proceeded to point out the other limitations upon the applicability of the statute, substantially as is done here. Nevertheless, the matter has been reported broadcast in a form representing that the Clayton Act granted jury trials, generally, in contempt cases. On the contrary, the court carefully differentiated between the rare instances in which the jury trial can be demanded and all other cases in which it is shown that the legislative branch has no power to grant jury trials.

With respect to all Federal jurisdictions in order to obtain the benefits, whatever they are supposed to be, of jury trials, labor must first go to work at the illogical and difficult or impossible task of procuring congressional enactments making it a crime to boycott, or persuade, or threaten, or picket, or pay strike benefits, or assemble in numbers during a strike; else they must procure such legislation in all the States, constituting the Federal judicial districts.

Jury trial only contemplates the narrow class of cases where the conduct amounts to violation of the criminal law.

Another section of the Clayton Act requiring attention is section 6, which reads thus.

And then there is the text of section 6.

It is not easy to avoid misunderstanding if that statement be here fairly, squarely, and fearlessly dealt with, shorn of all cloud of irrelevancy which has been made to arise from the interjection of that sentence into section 6, where it has not the slightest connection with the balance of the section. Indeed, it has no connection with anything. We might go further and say it is not legislation at all. It places no obligation on any court or person anywhere to do or not to do anything whatever, or to observe any rule of conduct whatever. And yet that expression has been widely proclaimed as a valuable contribution to labor. But nothing that anyone may say can make the expression, though unquestionably true, either more or less vain and worthless with reference to the struggle in which labor may engage for legislative relief, or has bearing on any injunction case.

When you come to analyze an act of labor and contrast it with the conduct of business, they call for the exercise of the same creative functions of the man's mind, the same powers of imagination, of thought, of consideration for what you are about to do, for coordinated action in certain particulars to produce a certain physical result are called forth into being in the act of the business man who employs labor, who looks to the income to be derived from labor as applied to machinery for the production of property or for the production of material. The same creative faculty, the same imagination, the same mental processes, Mr. Chairman, are called for in the simplest and more fundamental acts of the individual laborer himself.

It is true one acts under the command of the other, but in the doing of any specific thing that calls for him to exercise his intelligence, to use his judgment, his faculties directed to the thing that he is about to do, in its proper sense neither one of those processes amounts to property in any sense. [Reading:]

Labor is not a commodity or article of commerce any more nor any less than the activities of a manufacturer in the market where he sells his products. One or two judges have declared in gratis dictums, wholly aside from the merits of the cases before them, that labor is property. But suppose 40 or any number of judges so declare. It would not settle anything relevant to the matter with which we are now dealing, because the jurisdiction is not pivoted or based on or related to the labor side of the question of what is or is not property or a property right. Whether or not the abstraction called business, or the mere privilege of doing or carrying on business, is property or a property right is the debatable question, and in the decision of that question neither party has any interest in the definition of labor. But if it was thought worth

while to insert that sentence at all why didn't they make it read thus: "Neither the labor nor the business of a human being is a commodity or article of commerce"?

The real issue is none too simple when shorn of nonessentials; and all who undertake to discuss it should leave out all mere abstractions and cling to the real issue.

We now come to a consideration of the balance of section 6, quoted above. If those in control of the legislation had really intended to exempt the associations named in the section, including labor unions, from liability under the antitrust act, conceding for the present purpose only that such liability existed, they way to have done it was plain and unmistakable. The straightforward and direct way was to insert language which changed the antitrust act. What they did was to cater to the unfounded apprehensions of certain misinformed erratic persons, who had no clear conception of what the courts had held on the subject, and to inject into the hodge podge section such language as almost any pupil at a night school should be ashamed to use.

In the first place, Congress has here attempted no more than to construe a statute without amending the statute in any particular. It must be conceded by all that the task of construing statutes is truly judicial. And if by any possibility a case should arise calling for the application of section 6, it would be held a nullity for that reason, if for no better reason.

But that just mentioned is not the only phase of abortiveness. It is only necessary to call attention to two words. The language is that the antitrust act shall not be "construed to forbid" the existence and operation of certain organizations (naming members of such organizations, from "lawfully" carrying out the "legitimate" objects thereof. The concluding clause is, "nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws." It adds nothing to what precedes. Any legislative attempt to authorize men or a body of men to "lawfully" carry out their "legitimate" purposes, of which assumes that they need such legislative authority, is sheer nonsense.

In arguing for an amendment, and to show the utter abortiveness of the section, Thomas (Democrat, of Kentucky), a talented member of the Judiciary Committee, said:

"Mr. Chairman, to say the least of this amendment (section 6, minus the first sentence, having been reported as a committee amendment), it is as ambiguous as the prophecy of a Roman oracle. As a matter of fact, it means nothing. It is a mere declaration of that which is now law. To make the statement that this law shall not be construed so as to hold certain organizations to be illegal is simply to state that those organizations per se shall not be declared illegal by this law. You might just as well insert a paragraph declaring that under this law the Baptist Church or the Masonic order shall not be construed to be an illegal combination in restraint of trade."

There is only a short summary here, and then I will have concluded this reading.

If it be conceded that the mere right to do, or the right to continue business, its equivalent, is a property right, entitled to protection by injunction, it can not be consistently claimed that the branches, departments, and essential incidents—for instance, the hiring of help—are not also entitled to such protection. In the face of such concession, how with any show of reason or consistency can those making the concession defend against injunction or in contempt cases based on such injunctions, for instance, against any order forbidding interference with the movement, even on a public highway, of one employed or seeking employment in a plant, or with any business institution? Bills of complaint in such cases are usually so prolix and voluminous—purposely so—that not even competent lawyers, for the fees that defendants will pay, can afford to devote the time and labor necessary to analyze and digest them. The nature and scope of the business of the complainant and its manifold activities are usually set forth elaborately, and that branch pertaining to the number of employees and the rights of the complainant in the matter of employing men or women "in the labor market" are seldom omitted. Thus the business rights and tangible property are scrambled together, so that it requires a high degree of professional skill and expertness to deal with such a case.

2. Decisions subsequent to the passage of the Clayton Act (notably Duplex Printing Press Co. *v.* Deering, 254 U. S. 443) give the same force and effort to the antitrust act where its provisions and remedies are invoked against labor

organizations as before its passage; that is to say, the rule laid down in Loewe v. Lawlor (208 U. S. 274), is as applicable since its passage as before.

If the committee will permit me a little more time, I would like to analyze the Duplex case and the Bedford Stone case because there they held that those provisions mean nothing. [Reading:]

3. Labor unions and their district and local branches are distinct legal entities and may be sued as such upon process served on their principal offices, for the torts committed by them during the strikes; and their funds are subject to execution as in cases against individuals, corporations, and copartnerships, notwithstanding section 6 or any other provision of the Clayton Act (United Mine Workers of America v. Coronado Coal Co., 259 U. S. 344.) On the other hand, labor unions engaged in carrying out their legitimate purposes are exempt from the provisions of the antitrust act now exactly as before the Clayton Act, just as are agricultural and commercial bodies and other voluntary associations exempt. There never was any foundation, in fact, for the alarm sounded, after the decision in the Loewe-Lawlor case that labor unions, as such, were being, by the courts, held amenable to the Sherman Antitrust Act.

The argument, as you come to read it and apply it in connection with the decision in the Bedford Stone case and the Duplex Printing case show the utter fallacy of expecting any relief from the Clayton Act.

Now whether the act as it now stands is going to be sufficiently repealed without specific reference to it is a matter the committee, of course, will have to decide.

Senator Norris. Now, Mr. Martin, included in that is a criticism by that author of section 20, where he says the law does not define property, does not define the word "peaceful." I did not myself suppose that the word "peaceful" needed any definition; that the common people, ordinary persons, as well as educated folks, know what "peaceful" means; but there might be some reason for putting in a definition of "property."

Suppose we felt after consultation that the law ought to be amended, and that this bill would accomplish the result desired, why could we not define property in the Clayton Act, perhaps using this bill to define it, rather than to repeal anything? Would not that accomplish the result?

Mr. Martin. I don't quite understand. Would you refer to the Clayton Act, you say?

Senator Norris. Define property in the Clayton Act, and just amend a section of the Clayton Act, and in that amendment write in a definition of property. Assume that we would agree to this bill as it defines property, put that right in that section.

Mr. Martin. The difficulty is in doing that and one inherent objection to that would be found in this, that laws should operate uniformly and should avoid the giving of class legislation. Now, the only constitutional inhibition against class legislation is in the fourteenth amendment, that no State shall deprive one of equal rights.

Senator Norris. All this bill pretends to do is to define property.

Mr. Martin. Yes; but this bill as now drawn reaches all classes, Senator, and if it were included in the Clayton Act you would then be dealing with a special class of people, with labor, then the question of equal rights before the law would come up, and the question would arise as to the propreity of the classification and the legislative relief extended to a class.

Now, there is not, with respect to Congress, any limitation upon class legislation. The only limitation is upon the exercise of class legislation by the States, that no State shall deprive one of equal rights before the law. The language of the fourteenth amendment, Senator, is "Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Of course, that limitation in express terms reaches the conduct of the State. No State shall do that. There is no limitation in the Federal Constitution against the creation of class legislation as such, except that that is a fundamental precept of all constitutional law, that the law shall be equal, that we shall all be equal before the law, that the legislature shall not legislate for classes, except—and the courts define the power to be except there be a clearly defined field affecting a class of people which needs relief, in which event our Supreme Court has said that laws may be justified when they meet with that definition. But, primarily, it is a thing to be guarded against.

Senator NORRIS. Would you say if we passed this amendment the court will find it unconstitutional?

Mr. MARTIN. They did so, sir; in the Truax case.

Senator NORRIS. What I am trying to reach is a practical way of reaching this remedy. I may be wrong, of course, but in my judgment there is no real possibility, no matter what this committee does, of Congress passing a law that will repeal the Clayton Act or the Sherman Act. It seems to me no matter what we want to do we ought not to deceive ourselves concerning what is in front of us.

Mr. MARTIN. Then, by all means, Senator, I would if I were asked my opinion, leave the matter in the form of an independent bill, without attempting to inject it as an amendment to the Clayton Act for fear that it might be held to be class legislation.

Senator NORRIS. I have not much faith in my own judgment, because I can not see for myself how some of these injunctions have been issued under the law as it stands now. I can see no excuse, for instance, for some of them. So it may be no matter what we pass the courts will construe it to be something else.

Who was the author from whom you have been quoting?

Mr. MARTIN. Lewi and Spelling, published in 1926.

Senator NORRIS. They make a very interesting argument there, but this law, when it passed Congress, was intended, there is no doubt in my mind, and I do not think there is any doubt in anybody's mind, to prevent injunctions such as have been issued over and over again since its passage. While I think some of the criticism the author makes there is very good yet it does not seem to me that Congress ought to be called upon, when it uses the expression "peaceful means" to put another section in there to tell the court what it means by "peaceful." We might later on have to define what we mean by black or white or blue or red so the court would not go wrong on it, and we can run ourselves into an absurd position.

Mr. MARTIN. Certainly; but you correct it by that appeal, then you would have recourse to the simple definition of the common law, that the right to combine for the protection of one's self or one's right can not be interfered with by injunction.

Senator NORRIS. Now, this Clayton Act came after a long series of debates and after long consideration. It was one of the laws that an administration prided itself on. It was considered an administration measure. They were satisfied with it when they got it through, I think I know, in the best of faith. I was not part of the administration that framed it, but I know that man who did frame it, and I know what debate it had and what discussion it had. I think I know what they thought they were doing. Whether they were right or wrong is a different thing. They thought they were, and they thought they had a remedy that was going to reach what they claimed and believed to be an evil. It did not reach it at all.

Mr. MARTIN. No; but to understand that, Senator, there is a complete answer to your inquiry as to its ineffectiveness, and if I may be permitted to-morrow morning I would like to call your attention to the Fedford cut stone case and the Duplex decision. Those decisions nullified that law, they emasculated every wholesome feature of it.

Senator NORRIS. Well, just admitting that they do, what assurance have we that another act we pass may not be nullified?

Mr. MARTIN. You take away the jurisdiction.

Senator NORRIS. Well, suppose we do take it away, and they say, as has been argued here, that we have no constitutional right to take it away, and they assume it and go ahead.

Mr. MARTIN. Then I assume you would have to go to the country and it would be one of the major political fields of discussion, just as was the old controversy between the states-rights men and the liberal constructionists, because they came to an impasse at the time of the Civil War.

Senator NORRIS. Well, that ought not to be necessary in a question of this kind.

Mr. MARTIN. No; but I say go to the public. If the court would not consider it, Senator, what can you do but go to the country in debate politically?

Senator NORRIS. I am not trying to find fault, even with the courts in the construction they put on this law, but I do know that there were great lawyers and statesmen who, in the best of faith, undertook to prevent the promiscuous issuing of injunctions, and they put in it language that, after great consideration and debate, they thought was right, and it did not accomplish what they thought they were accomplishing at all. Another set of men afterwards, the courts, construed it, and maybe they were right and the Congress was wrong, but I only mention it. I am not saying who was right or that anybody was wrong. Evidently the object to be accomplished was not attained. It was a failure, and yet the best men in the country were engaged in trying to bring it about.

Mr. MARTIN. That is true.

Senator NORRIS. I do not think there is any dispute about that. What assurance have we that we can do any better?

Mr. MARTIN. Only that Mr. Spelling points out the weakness and the ineffective part of the law as it is and makes some very cogent suggestions.

Senator NORRIS. I know he does. I think he does myself. The question rises in my mind now, Would it not be better, if we think

a law ought to be passed, to take his suggestions, follow them, and take the law that Congress has passed and put into the law in the form of amendment the suggestion that Mr. Spelling makes why would not that bring it about? You are afraid to do that for fear it would be unconstitutional. Evidently he does not think so, because he is speaking sarcastically of the law——

Mr. MARTIN. That is true.

Senator NORRIS. And rather holds Congress up to ridicule in passing it. He said, "You do not define property. You tell me I can do certain things by peaceful means and you do not say what you mean by peaceful means."

Mr. MARTIN. It seems to me, Senator, that we meet every objection when we deal with it independently under general terms that reach all persons, because this bill will reach the issuance of an injunction in all cases in every conceivable form where the right is tangible or transferable.

Senator NORRIS. Now, when you come to that I do not want to put my judgment up against anybody else's. I have heard so many opinions from other men on the subject, and great lawyers, that I almost feel that I do not have any opinion of my own. Now, some very able attorneys who agree with you that they want to pass some law, condemn this particular bill and say it has no effect whatever. When I hear that kind of an opinion from a man who wants to remedy what he agrees to be a bad situation as earnestly as you do—says this bill will not accomplish it at all, it will not do any good—I am wondering what the courts will do to it when it gets to them. They will say it does not accomplish anything, and then some writer like Spelling will come on and write a very sarcastic, ironical view of it, like the reference to section 6 of the Clayton Act.

Now, I was not the author of it, but I know the man who was and he is dead now. He was one of the greatest lawyers in the United States. He had one of the greatest analyzing minds of any man I have ever met, and that he was in earnest about it I have no doubt whatever. He thought he was going to do something great. I never shared that view exactly. I never thought that it would do any particular good.

Mr. EMERY. May I ask—I think I know the Senator you have in mind—was that idea original with him?

Senator NORRIS. I am referring to Senator Cummins.

Mr. EMERY. I only ask as a historical reference.

Senator NORRIS. As far as I know he was the author of section 6. Whatever might have happened later on with respect to different views that Senator Cummins may have held, at that time there was not anybody in the Senate more earnestly trying to bring about a practical solution of the difficulties than Senator Cummins, in my judgment.

Mr. FURUSETH. I think you are right, absolutely, in that. Senator Cummins was dissatisfied with section 6 entirely. He was the author of the original section, as you will find by reading the record. He offered the opening sentence of his own substitute to be inserted in section 6, which was that the labor power of a human being is not property.

Senator NORRIS. I think probably you are right about that.

Mr. FURHSETH. That is the real historical part of it—as I was sitting in the Senate gallery when that occurred.

Senator NORRIS. That part of section 6 that a great many people thought, and I thought, there was something in was that declaration. It seems to me that in construing that act any court that had any doubt about what it should be would construe it would that thought in view—that the Congress that passed the act made that declaration. Wherever there might be a misunderstanding, it was always understood that the human labor was not property.

Mr. FURUSETH. And that was exactly what Senator Cummins wanted to bring about.

Senator NORRIS. Yes.

Mr. FURUSETH. But all the distinguished lawyers on the other side convinced the courts that it was all so much claptrap. I do not know of any lawyer, so far as I have heard—not one single lawyer that I ever knew—who ever argued that it meant anything at all except what Spelling says it is.

Mr. MARTIN. Mr. Chairman, a consideration of a few passages in the Duplex case and the Bedford Stone case will make quite clear the weakness of that act. Now if you care to hear from me at any time to-morrow I would be glad to have a little further time to make some comment upon those two cases and what we believe this law will effect in view of what they have said so forcefully in those cases both with respect to the majority and the minority opinions. I would like to call your attention to the minority opinions of Judge Brandeis in those cases and contrast it with the majority opinions and with what they say about the Clayton Act in the majority opinions, from which you will see that it is hopeless, I believe, to expect any relief from any inclusion of this bill in the Clayton Act, and from what was said in the Truax case you would run dangerously close to the objection that it might be class legislation, whereas if you deal with the subject independently and take it up and treat with it as an independent subject, dealing with the jurisdiction of a court in equity, with the substitution of the word "or," you reach in equity all the classes of property that should properly be protected by injunction and you eliminate from that broad inclusion all those cases which the Clayton Act did not reach.

Senator NORRIS. From this criticism by Mr. Spelling I gather the idea that if Congress, when it passed the Clayton Act, had put in the amendment it would have accomplished something. He may be right about that.

I think he is too critical and just a little bit narrow-minded, and what seems to me to have been wrong was the courts when they came to construe it. They were trying to be too technical. For instance, in section 6 of the Clayton Act they disregard, of course, the statement that the labor of a human being is not property, and while that is just an abstract statement, it is in the law, and it showed the intention of Congress when they were dealing with labor. They seem to have gone on the theory, in most of these injunctions, that it is property.

Mr. MARTIN. It is the only basis, Senator, for these injunctions.

Senator NORRIS. It seems to me they could not issue the injunction on any other basis, and yet Congress has said in so many words it is

not property. When you are dealing with that kind of a condition I confess that I feel almost unable to prepare a statute that would meet it.

Suppose now we added to section 20 some other and additional things in which we negatived the right of the court to issue injunctions. We have found that some of these injunctions have been issued and sustained on the ground that they were issued against people who were not employees. That could be remedied by an amendment so that there should not be any injunctions issued of that kind. Some of the injunctions have been issued and sustained on the ground that the laborer or employee had a contract. Some of those contracts, as I have looked at them, do not seem to me to sustain the injunction for one moment.

Mr. MARTIN. That is the so-called yellow dog contract?

Senator NORRIS. Yes. But they have issued the injunction. Now, we could amend that by saying that no injunctions should be issued restraining anybody from advising individuals to quit work, even though they had a contract.

Then, you have had other injunctions issued restraining men from making contributions, whether they are members of the union or otherwise, to assist in the prosecution of cases in the State courts. I can not myself understand how they could issue those injunctions under the existing law. If they do, we can amend that and provide that they should not do that. I can not myself see why the court should restrain me or anybody else from giving any advice I want to about a contract.

Now, I do not want to go so far as to prevent the issuing of an injunction, which would be a sweeping thing, which would take away the power more than I would like to see it taken away. I do not want to prevent the court from issuing injunctions for the protection of property in any proper case where it ought to be protected, and perhaps some of these would have been justifiable on that ground. But they have not followed it that way. It seems to me they have misconstrued this law, the Clayton Act.

Mr. MARTIN. The courts have not reached to the inhibition against doing harm to the property. They did not say you should not do that, but they have said I should not talk to the other men, I should not give them any advice.

Senator NORRIS. I know it. I can not sustain that kind of injunction on any ground, on any existing law. I ca not see that it would be justified under any existing law, but it is there, and it was a real live wire when it was in operation. There is no doubt about that. Men have been restrained from peacefully advising some fellows from doing something.

Mr. MARTIN. Why, I understand, Senator, that 40,000 men in the coal fields of West Virginia are in a condition to-day almost amounting to involuntary servitude, held there because they can not move out of the district, they can not talk with each other, they can not advise each other, they can not do anything that they would do for their own protection. The injunction covers every act that they might do.

Senator NORRIS. That is probably true in some of these cases, and as I look at it there is not any law that justifies the issuing of the injunction. How can you remedy by statute a condition of that kind?

Mr. MARTIN. Because, sir, it rests upon the false concept that that is property, and then the Clayton Act gives jurisdiction to the Federal judge for him to define it, and then he, by process of exclusion, says, "But this is not within the terms of the Clayton Act." I would think, Senator, if you wanted to get away from that condition, that if you passed a simple general law in express terms reaching all people and all courts——

Senator NORRIS. Yes. Now, that is simple on its face, but here we have had before us quite a number of very able attorneys who have spent years on the side of labor here as well as on the other side, who have said, "Why, this bill won't do any good." I have found so many instances where, under existing law, judges have done things that seem to me they had no right to do, that I confess I am bewildered, and you fellows may be right, and maybe it will not do any good. On the other hand, it is contended, of course, by some of those who are close to it, that it is a revolutionary measure, it will destroy all the rights that pretty nearly anybody possesses, and that it is unconstitutional because it does that.

Mr. MARTIN. I think they considered it only as drawn, with the conjunction "and," so that it must be tangible and transferable, but when you divide this up, so as to make it read "tangible or transferable" you then take care of all classes of property or property rights that need any honest protection under the law.

Senator NORRIS. I am not saying, Mr. Martin, that you are wrong. You may be entirely right about it. Very eminent attorneys on the same side of the case do not agree with you.

Mr. MARTIN. I do not know that they have considered the subject disjunctively rather than conjunctively.

Senator NORRIS. Well, we will adjourn until to-morrow at 10.30 o'clock.

(Whereupon, at 1.10 o'clock p. m., the hearing was adjourned until 10.30 o'clock a. m. to-morrow, Thursday, March 22, 1928.)

LIMITING SCOPE OF INJUNCTIONS IN LABOR DISPUTES

THURSDAY, MARCH 22, 1928

UNITED STATES SENATE,
SUBCOMMITTEE OF THE COMMITTEE ON THE JUDICIARY,
Washington, D. C.

The committee met, pursuant to adjournment, at 10.30 o'clock a. m., in the committee room, Capitol, Senator George W. Norris (chairman) presiding.

Present: Senators Norris (chairman) and Walsh of Montana.

Senator NORRIS. You may proceed, Mr. Martin.

STATEMENT OF WINTER S. MARTIN, ATTORNEY AT LAW, SEATTLE, WASH., REPRESENTING THE AMERICAN FEDERATION OF LABOR—Resumed

Mr. MARTIN. Mr. Chairman, in one or two recent cases of the Supreme Court, in which the force and efficacy of the Clayton Act and the right to an injunction has been considered, I think I can show you the propriety of considering this relief from the standpoint of an independent act rather than to attempt to work out a solution through existing laws.

The cases recognize so clearly the property right upon which the injunction issues that I shall call attention first, briefly, to the condition which results from the exercise of the injunction from that standpoint.

Among the cases that I call your attention to is, first, the case of Bailey *v.* Alabama, for there, in the Bailey case, the fundamental reference to the existence of the thirteenth amendment is considered.

Before calling your attention to that case, however, let me advert for the moment to what I understand the testimony to cover, in a general way, in this case. I understand that the use of the injunction has reached the point in the Pittsburgh mining cases where, in the occupancy of company houses, the defendants have been denied the rights of tenants under the State law.

Conceiving that they have rights under the State law which need adjudication, they have attempted to take an appeal and, fearing that the State courts might qualify the use of the injunction or render it less effective, they have been denied the right of appeal, the right to consult with attorneys, the right to furnish bonds, and I am not sure in general terms what they have done in that particular, but they have so protected by injunction the plaintiff companies as to absolutely deny the citizens the right to resort to the laws of their own State.

The police power of the State is not being enforced as to them; and the Federal injunction reaches out and puts them in a position which we conceive to be but the equivalent of involuntary servitude. The situation in Indianapolis is that the court, by its action, has given directions to the defendants' lawyer employed in that case, that he shall forthwith advise his clients to call the strike off and do certain things or take the consequences, a threat directed against the lawyer himself.

Considering now, in the West Virginia fields, that this injunction has protected, through this device of the so-called "yellow-dog contract," a contract that the employers have got from the men, so as to allow or justify the issuance of an injunction without any thought other than to lay the foundation subsequently for an injunction. So far as the actual contact between the company and the men goes, the covenant that the workman will not join a union is so entirely superficial, so entirely remote and collateral to the main purpose of the contract, that it should not be entitled to any consideration, and they do not base any claims upon it in so far as it has any direct bearing upon the relationship of employer and employee.

The only reason that collateral covenant in the contract is employed is that those men will not work for anybody else during the period of the contractual engagement, and will not listen to any agitation or will not consult with anybody who has any purpose to defeat their ultimate purpose of maintaining an open shop.

So, it is entirely collateral to the contract in question and has nothing to do with the actual terms and conditions under which the men serve. The contract is hardly worthy of the name "contract," because a contract is a meeting of the minds of competent contracting parties, and there is no competency in that situation; there is not any possible meeting of the minds. The men are forced by circumstances to go to work, and under the contract they have to work on these conditions in order to get the job; they are selling themselves and are denied their constitutional rights; they can take the job or leave it, just as they wish.

The economic condition which prevails with reference to those matters, is such that he has got to work; he has followed mining, say, all his life and lived in that community, has a family, and there is nothing else for him to do but to sign that contract, and he signs it; he is practically forced to sign it to exist, because this has been his calling throughout his whole life. Those contracts, however, furnish the employer, when he subsequently wishes an injunction, an opportunity to say here is a contractural right, a property right, and he argues that as an economic method of asserting his right through the contract, and goes into court to sustain his so-called right. It is a collateral provision in the contract that does not go to the essence of the contract and, of course, they do not care a rap about it at the time they enter into the contract, except only in so far as it might serve the employer to appear and use it for the purpose of an injunction in the Federal court later on.

Now, this action by injunction would not matter so much if it did not affect a great principle, or 30,000 or 40,000 people living under such physical conditions as amounts to involuntary servitude. There they are, and if it does directly affect so many people in their human rights, it is a very substantial matter of inquiry.

Now, the same thing was characterized as wholly wrong in the case of Bailey *v.* Alabama, and the fundamental principle shorn of its abstractions carries out the idea and is exactly the same thing in both cases. I do not believe there is an honest point of differentiation between that situation and the situation developed in the case of Bailey *v.* Alabama, to which I want to call your attention, Mr. Chairman.

This case was decided in 1910 in the United States Supreme Court, in volume 219, page 219. It was a criminal case, wherein the situation of an indictment and prosecution under it should be sustained, and went before the Supreme Court upon a writ of error to the highest court of Alabama.

There was a statute in force in Alabama, as early as 1896, which was that any person who with intent to injure or defraud his employer entered into a written contract for service and thereby obtained from his employer money or other personal property, and with like intent and without just cause, and without refunding the money or paying for refused to perform the service, could be punished as if he had stolen it.

This statute was subsequently amended in 1907. Prior to the amendment, however, the prosecutor, in prosecuting a case under that statute, was held to prove the criminal intent as a necessary ingredient of the offence. The legislature was prompted to make an amendment, which, I believe, originated in the same thought—it came perhaps from the same source as that from which the so-called "yellow-dog" contract comes from—the same source, the same economic force behind it; and that section was amended so as to make the refusal or failure to perform the service, or to refund the money or pay for the property, without just cause, prima facie evidence of the intent to injure or defraud.

And, under that amendment, Bailey, a poor colored man, was prosecuted for obtaining money and having quit and not having refunded it. He was prosecuted and found guilty and was committed in jail a great many months—I think, as I remember it, he received $1 a day to pay off this penalty, and I think he was imprisoned for a couple of years.

The court says, quoting the statute:

> And the refusal of any person who enters into such contract to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer, or defraud him.

There was a rule of evidence in existence in Alabama which provided that the uncommunicated thoughts and motives of the defendant were not admissible in the case, so that before the statute—the defendant—they had to prove him guilty; they had to show the criminal intent by evidence to convince the jury beyond a reasonable doubt, in addition to the mere fact of him quitting the employment and receiving the money.

Now, keeping in mind that rule of evidence in Alabama, that the uncommunicated purpose or intention was not admissible—and I think that is sustained by the weight of authority, if you have not done anything or expressed any thought, it should not be given serious weight by a jury when you are charged with the commission of an offense.

Now, with respect to that conviction, they say, in considering prima facie evidence:

> Prima facie evidence is sufficient evidence to outweigh the presumption of innocence and if not met by opposing evidence to support a verdict of guilty. It is such as, in the judgment of the law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose.

The court held the act unconstitutional, because it compelled them to serve in a condition of absolute slavery. For the reason that the statute which wiped away the necessity of proving his guilt, it subjected him to imprisonment upon the bare fact of taking the employment and receiving money without paying it back and quitting his work.

I read briefly a paragraph, wherein they say:

> What the State may not do directly it may not do indirectly. If it can not punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which upon proof of no other fact exposes him to conviction and punishment. Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question, and it is apparent that it furnishes a convenient instrument for the coercion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based. The provision designed to secure it would soon become a barren form if it were possible to establish a statutory presumption of this sort, to hold over the heads of laborers the threat of punishment of crime, under the name of fraud but merely upon the evidence of failure to work out their debts. The act of Congress deprives of effect all legislative natures of any State through which directly or indirectly the prohibited thing, to wit, compulsory service to secure the payment of a debt may be established or maintained; and we conclude that section 4730, as amended, of the Code of Alabama, in so far as it makes the refusal or failure to perform the act or service, without refunding the money or paying for the property received, prima facie evidence of the commission of the crime which the section defines, is in conflict with the thirteenth amendment and the legislation authorized by that amendment, and is therefore invalid.

Fundamentally, the situation with which you are here confronted, is the same as that in West Virginia. What is it? In the West Virginia case the employer is permitted to write into the contract a collateral matter of no concern for the very purpose of furnishing a foundation for injunction, and later, when the injunction is sought when the man seeks to exercise his constitutional rights guaranteed by the first and thirteenth amendment, he is confronted with the contract, which is conceived to be a species of property, which entitles the employer to protection.

Under the thirteenth amendment no condition of involuntary servitude shall exist. The amendment deals, Mr. Chairman, with that condition; it does not deal directly with the one act, but the condition of involuntary servitude as an insufficient essential existing, and it was written after four years of Civil War, because prior to that the service of the negro was thought to be property—at one time he was property, actual property; and later, this statute was created to prevent, for all times, involuntary servitude, and now, you have in aid of that constitutional provision, the equalities found in the first amendment; and the right of freedom of speech, the right of petition, and the right of lawful assemblage.

Now, freedom of speech, if it amounts to anything, amounts to what it says, that you may speak freely; in other words, the framers of the Constitution conceived the idea that people should have the opportunity under our democratic form of government to discuss matters. It did not deal with the quality of their discussion, as to whether it met with approval, or whether it offended a large number of people or a small number of people. I believe it was conceived that persons might override that freedom and might abuse it at times, but it was conferred upon the people that the freedom of people shall not be abridged.

Now, if there is anything in that, it seems to me that right is fixed by the Constitution. If that is so, why can not men meet with other men and discuss matters under that right, as they tried to do in West Virginia. There, they went to the men and told them their services belonged to them. They had joined their own union. They did not advocate the destruction of property or the commission of crime. It is true that the law recognizes that service as a right, and if we continue to view it so under this statute; and the income from property, the mere fact that they furnished money, and contracted with their men, I suppose that is really interfering with the right to make money, but because men unite and combine together that they will not work upon the terms that the employer has foisted upon the employees, in that sense it is an interference with property right, if that be a property right. But if you conceive that the right of the income from labor, or from the combined efforts of a group of men is not a property right, why, the whole premise is false in the beginning, and the injunction is issued upon no fundamental or substantial basis, not upon any recognized legal basis under the law.

Let us look on the injunction in its actual practice to see what it accomplishes. The men, by the denial of the first amendment, the relief afforded by it, and the thirteenth amendment, are held just as much to a condition of involuntary servitude as they would be if they were working under the conditions as they existed prior to 1860. He is a married man; he can not move from the community; he is a miner and knows nothing else, so he can not move away from the place except, perhaps, to go to some near-by field where conditions may be equally bad, so he is held or forced by economic circumstances to stay where he is; and if he exercises his right of free speech under the first amendment, as in the Pittsburgh Coal cases, he tries to appeal to determine what his rights are, you run into that question as to whether the rights of landlord and tenant apply to him, under the statute.

If that be the fundamental purpose of the statutes in such cases, and if this man conceives himself to be worthy of relief, desires to appeal, setting up a tenancy which the law recognizes and which he believes protects him, in case of eviction, he immediately runs counter to this injunction. The injunction denies him the right of trial by jury. It is heard upon affidavits usually of a lot of people who make affidavit in the lawer's office, and the lawyer writes the affidavit; and if the lawyer is not honest, intellectually honest, and if the lawyer takes the facts and distorts them as is commonly done—that has been done in a number of cases; I have seen it happen in the courts—if he distorts the affidavit by using his own language so

that it does not contain the proper facts as disclosed by the client, there is the affidavit and it becomes the basis upon which the chancellor acts.

He is deprived of the right of trial by a jury; he is deprived of affirmative proof by witnesses, and he is deprived of the value and benefit of cross-examination. The courts have said that the right of cross-examination is a part of the fundamental law of our land; the right of trial by jury and, when exercised, the right to be confronted with witnesses against one in open court, and the right to cross-examine witnesses in open court are among our fundamental rights under our Government.

However, all of those things are swept into the wastebasket and the chancellor acts, finding the man guilty—finds that the injunction shall issue, grants the injunction, and, for a violation of the injunction, he usurps the functions of the jury, and finds him guilty of contempt.

Many times if the United States attorney does not act, the court issues a rule that the United States attorney shall act, and in many instances he combines the finding of the prosecutor and that of the judge—and, at all times, combines the function of the jury with his own and then he grants the injunction and the circuit court of appeals puts the finishing touches upon it by saying he is the sole judge of the fact in the case, and they will not review the case except for a clear abuse of judicial discretion warrants it, which is about one case in one hundred thousand.

So, when the judge has determined the facts, the court of appeals has said they do not feel like they can disturb the finding, and that they decide the case, in the first instance, on the testimony as presented by the affidavits.

So, continuing to disregard the abstractions and coming down to the actual condition that you are facing, you find that they are living—or, at least the people of West Virginia, in those industrial fields—are living in an absolute condition of involuntary servitude, and I can not see any rational difference between the facts in the case of Bailey *v.* Alabama and in the situation disclosed by the testimony which has been furnished this committee concerning which there is such substantial proof.

I can not see any line of differentiation. If we get away from abstraction, we can see, of course—if you have a different political or economic concept of property, why, there is, of course, perhaps a difference. If the property of the employer, if the right of the combined earnings of his plant, on the basis of 10,000 men employed, covering long hours of service, and covering conditions which they had no right to control, is a property right, then of course they are combined to correct that situation if allowed.

There is a deplorable situation which should be corrected.

Now, the way to correct it is not through the antitrust act or the Clayton Act, but rather through independent legislation which will not pick out labor as a class, because you run counter to what the court said in the case of Truax *v.* Corrigan, as applied to class legislation, which decision rested upon an act or a statute and, of course, the inhibition against class legislation as directed to States and not the National Government.

And as I read the Constitution, there is no specific inhibition against class legislation on the part of the National Government while there is against class legislation of the States, for no State shall deny the equal protection of the laws.

But there is a fundamental precept in all legislation that laws shall operate equally, and it is only in the special cases where there is found a public necessity for relief on the part of certain classes of people that need protection that they may be given that relief under what might be called special legislation for their benefit. Equality before the law—class legislation shall not be permitted. There is no appeal from the Supreme Court of the United States in those cases holding such an act class legislation; and it frequently resolves itself not into a question of law, but to a question of economics, of social question, and after all a political question, and those things come into the decision because those learned men on that bench can not be understood to be men of little learning, or that they can be considered as acting by other than the highest motives. The fundamental difference in these five-to-four opinions of the Supreme Court rest upon the whole view of life, the whole concept of these rights, their social and political differences, those economic differences, upon which men may at all times come to a different conclusion, and when they arrive at that conclusion and that conclusion supports the theory that the labor of an individual is a property right it justifies the exercise of this injunctive power and furnishes sufficient cause for government by injunction rather than by laws.

Now, England has never developed to any extent that social view. England has confined her remedies in this matter to the effective power of the police and by a resort to the ordinary criminal law for protection, and in all of these cases the remedy at law both for damages and the remedy in the criminal law to protect and guard against breaches of the peace and acts against the destruction of property as property is understood.

Now, I do not think you can reach this situation any better than by the act in question, because the act deals fundamentally with the rights of people without any class legislation—the citizens of the United States, at least with the jurisdiction of the chancellor. It would seek to prevent the chancellor's decision, as it has so many times been humorously spoken of, as if it depends upon the length of the chancellor's foot; and there is a vast weight of argument in that, because one man may conceive it to be a humanely right to issue an injunction and probably another man may have a wholly different opinion, and the dividing line between the question of a political and economical situation is hard to find. Both men are right according to their concept.

Now, the Clayton Act in the United States Supreme Court has been so emasculated as to afford no effective relief whatsoever. The first question as to protection afforded by the Clayton Act came up in the Truax case—the first real consideration of the Clayton Act came up in the Duplex Printing Co. case in 1920. Later on in the same year it came before the court in the case of Truax *v.* Corrigan, that had to do with an Arizona statute which embodied the terms of section 20 of the Clayton Act of Congress. This artificial construction of the Clayton Act reached its maximum develop-

ment when you consider the decision of the Supreme Court in the Bedford Cut Stone case.

Now, those three cases, the Duplex Printing Co. case, the Truax *v.* Corrigan case, and the Bedford Cut Stone case, show you of what little value section 20 of the Clayton Act is.

Senator NORRIS. Now, the Truax case involved the constitutional provision of the statute of Arizona?

Mr. MARTIN. Yes, sir.

Senator NORRIS. And the Bedford cut stone case involved the involuntary or secondary boycott?

Mr. MARTIN. Yes. They did not discuss the majority of the opinion, the secondary boycott so much as they did the direct violation of the Sherman Antitrust Act, and the effect upon moving the stone in interstate commerce, holding that this violation of the Sherman Antitrust Act was an improper and unwarranted enforcement of the interstate commerce laws in interstate trade.

Senator NORRIS. Wasn't it the Corrigan case—or the Coal case—where they held that, while, incidentally, it interfered with interstate commerce it was quite apparent from the evidence in the case that the object that the union had in that case was not an interference with interstate commerce, but for the purpose of improving their own conditions; that interstate commerce was interfered with it is true, but it was only incidental and was not a part of the intention of the union in that case, and held there, as I remember it——

Mr. MARTIN (interposing). That was the Coronado case, wasn't it?

Senator NORRIS. I am speaking of the Coronado case; that they held that in the Coronado case.

Mr. MARTIN. Yes, sir.

Senator NORRIS. Can you harmonize that with the holdings in the other cases?

Mr. MARTIN. It can not be harmonized at all with the Duplex case nor with the Bedford cut stone case. The acts there were collateral to any direct effort to prevent the movement of property in interstate commerce as in the Bedford case. In the Bedford cut stone case, the men refused to work upon unfair stone; they did not interfere with the contractor, or with the manufacturer who was turning out the stone from dealing with any other stone, except the stone which was unfair to them; and they were all members of the union, and had been for many years members of this central body which had in its constitution that provision for binding together for their own protection, for self defense.

There is no proper ground for harmonizing those cases or bringing them together. It comes back to this question of the length of the chancellor's foot, because it can not be harmonized at all.

Let me call your attention, if I may, to some of the statements in the Duplex case.

Senator NORRIS. That is the Duplex Printing Co. case?

Mr. MARTIN. The full title of the case is Duplex Printing Press Co. *v.* Deering, et al., reported in 254 U. S. 443. In that case there were four or five manufacturers of these huge presses. They covered the entire field of supply.

The Duplex Co. had its factory out in Michigan. They entered into—or, rather, they refused to enter into—a contract with the unions, although all the other printing companies, manufacturers of the large presses, of whom there were three or four, had entered into the contract with the union. This company refused to do it.

When a strike was called on their plant in Michigan, the striking machinists were allied with other union members, affiliated unions, who had occasion to handle the presses after they had come to a rest in interstate commerce, in setting them up, and repairing them, and keeping them in repair, and moving them, and things of that sort. Now that organization, in the sense that it reached several groups of employees who were bound together in the same situation economically for their own protection, agreed that they would not work or render services on this unfair article. True it was a coercive measure, but it was a defensive measure likewise.

They were exercising that right not as a mere interloper, subjecting themselves to a violation of the law, but used their combined force in an economic measure for their own protection.

The striking employees in the Duplex case did nothing more than that. They did of course approach people in New York, and told them that they ought not to work for the employing truck concern that hauled the presses; and the union which set the presses up and kept them in repair was approached, and asked to aid in this matter, that it was of common interest to all; but they committed no acts of violence, and they did not touch the goods physically. The acts were acts of omission instead of commission; at least in so far as the Duplex Co. was concerned they did not touch them at all.

Now the majority opinion——

Senator NORRIS (interposing). Were the court divided?

Mr. MARTIN. It was a divided court, four to five.

I said yesterday, and I repeat now, so that you may keep in mind the trend of the argument, that in so far as the criticism that this bill deprives people of their property without due process of law, such conclusion is not justified, but that the concept of labor being property—or, rather, that the right of labor and the income from labor is property is within the protection of the bill, because this concept of property did not exist prior to 1890; and not until about 1890 did this concept that labor is property creep into our law.

Senator WALSH. That is where I am not clear at all. I do not really understand the proposition of labor being property. I do not understand how it could be so considered; not that it was considered, but how anybody could consider it, or how anybody pretends to consider it.

Mr. MARTIN. The only thing I can say is the judges in their language do say it, and I was about to read you that proposition——

Senator NORRIS. I wish you would read that.

Mr. MARTIN. It is laid down right here.

Senator NORRIS. I do not understand the contention that you seek to refute.

Mr. MARTIN. Let us look right to the opinion. Here was an opinion in the Duplex case by Mr. Justice Pitney [reading]:

That complainant's business of manufacturing printing presses and disposing of them in commerce is a property right entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate

commerce is necessary for the successful conduct of business; that a widespread combination exists to which defendants and the associations represented by them are parties, to hinder and obstruct complainant's interstate commerce by the means that have been indicated; and that as a result of its complainant has sustained substantial damage to its interstate trade, and is threatened with further and irreparable loss and damage in the future, etc. Hence the right to an injunction is clear if the threatened loss is due to a violation of the Sherman Act as amended by the Clayton Act.

Upon the question of whether the provisions of the Clayton Act forbade the grant of an injunction under the circumstances of the present case, the circuit court of appeals was divided; the majority holding that under section 20, "perhaps in conjunction with section 6," there could be no injunction. These sections are set forth in the margin. Defendants seek to derive from them some authority of their conduct. As to section 6, it seems to us its principal importance in this discussion is for what it does not authorize, and for the limit it sets to the immunity conferred. The section assumes the normal objects of a labor organization to be legitimate, and declares that nothing in the antitrust laws shall be construed to forbid the existence and operation of such organizations or to forbid their members from lawfully carrying out their legitimate objects; and that such an organization shall not be held itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade.

But there is nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade. And by no fair or permissible construction can it be taken as authorizing any activity otherwise unlawful or enabling a normally lawful organization to become a cloak for an illegal combination or conspiracy in restraint of trade as defined by the antitrust laws.

They say:

Reaching the conclusion, as we do, that complainant has a right to an injunction under the Sherman Act as amended by the Clayton Act, it becomes unnecessary to consider whether a like result would follow under the common law or local statute; there being no suggestion that relief thereunder could be broader than that to which complainant is entitled under the acts of Congress.

One of the great defects in the Clayton law is that it permits an issuance of an injunction where irreparable loss, damage, and injury is about to occur. Damage to what? That is left silent. The Sherman Antitrust Act furnished the very foundation which, when changed to the idea that the right to the uninterrupted continuance of a business is property, there is the very foundation for the injunction, and that is the thing that you will correct if you step outside of the range of those laws and establish a basic law, which you have the power to do, dealing with the jurisdiction of courts of equity; you restore the fundamental right which has been taken from the people by the chancellor, and you come back to the trial by jury.

I suggested yesterday with the consent of Senator Shipstead, with reference to the bill introduced, that you strike out the word "and" and add the word "or," so that the bill will read "tangible or transferable," so that it will reach every range of property lawfully entitled to the protection of the injunction.

We say that it will do that when we concede that there is no property right in labor and that it can not be read into the words "tangible or transferable." Now, good will; what happens in the case of good will?

Senator WALSH. Can you conceive that that property right is not transferable?

Mr. MARTIN. You can, if you will follow the concept of the Supreme Court.

Senator WALSH. Just what?

Mr. MARTIN. Why, the right to the uninterrupted flow of business which is—the premise of which comes from the labor of others.

Senator WALSH. That is what I would like to see.

Mr. MARTIN. I think, sir, that is a fair statement from the cases. The authority for it is found in Spelling on Injunctions. I have not a citation of the number of cases in view of the limited range of time to go into these matters, but Lewis and Spelling in a recent work on injunctions, in dealing with this question——

Senator NORRIS. For the purpose of saving time, you went into that yesterday quite fully.

Mr. MARTIN. I would like to read just one sentence. I would not for a moment take the time to read all of it, but I want to call your attention to this one paragraph, if I may, Senator. [Reading:]

> That the bare privilege of working for wages, doing or conducting a business, or pursuing one's occupation or trade is a property right, or anything more or other than a privilege, must be conceded to be new legal doctrine, by all who will take the trouble to investigate the subject. And yet that doctrine, by repeated and cumulative adjudications, has become firmly established in the jurisprudence of the United States. Broadly stated, this right to conduct one's business, without wrongful or injurious interference of others, is asserted to be property, or property right, which will be protected, when necessary by injunctive process.

He says that this has arisen in the last 25 years.

Senator WALSH. I think that the right to be protected by injunctive process is quite a different thing from its being property.

Mr. MARTIN. Well, I have not come prepared to answer all those questions, because I have not had the time, and brought the cases that you asked for, but the cases do say that, and I think I can confidently say you will find cases dogmatically stating that the right to the continued flow of business without interruption——

Senator WALSH (interposing). I have the right to travel over a public road, and under certain circumstances I can easily conceive that an injunction may be issued restraining a party or preventing him from traveling over a public road, but there is no property right there that I can see.

Mr. MARTIN. That is true.

Senator WALSH. In other words, it seems to me that it does not necessarily follow that, in every case in which an injunction may properly issue, a property right is necessarily involved. My recollection is, and I think it is Hornbook law, that transferability is an essential characteristic of property.

Mr. MARTIN. That is true, sir; but in the limitation that we seek to impose upon the injunctive measure, it is limited to tangibility and transferability——

Senator WALSH (interposing). Good will is transferable.

Mr. MARTIN. Not in a direct sense it is not, Senator.

Senator WALSH. I have an established business, say, and I can transfer that business; I can transfer the good will and bind myself not to engage in the same business and thus interfere with the good will of my transferee to whom I had transferred the good will. Could not he be protected by injunction?

Mr. MARTIN. I do not think it would be necessary to do that, if the right that you speak of is so inseparably connected with the business, that is, it would come——

Senator WALSH (interposing). But I have, for many years, by hard work and intelligent and efficient operation established a business, and my physical assets amount to only $100,000, but it gives me a return that is a fair return on, say, a million dollars of capital ordinarily invested.

Now, some one comes along and offers me $1,000,000 for that business, and I am willing to turn it over, but they do not want me to set up in business on the opposite side of the street and thus compete with them, so I contract with them that I will never again engage in that business, either directly or indirectly, but I do, as a matter of fact, go and set up a business; isn't that a breach of the contract?

Senator NORRIS. Senator, it is only for the purpose of getting at the case here. I do not know why you put your illustration as you did; I have no doubt but what no injunction would be issued in that particular case, because you have stated in your illustration that you would never set yourself up in business in competition with this man. I think on that kind of a case the courts have held no injunction should be issued. If it were limited to a reasonable time, say, two, four, or five years, he would be entitled to an injunction.

Senator WALSH. There is no question about that.

Senator NORRIS. Let us modify it that way. Then, what have you got to say?

Mr. MARTIN. When you look at it that way, it is a condition that is inseparable with the business, and you will get with the transfer of that business a negative contract, a negative covenant, because that is all it amounts to. You can not deal with the question of good will, which involves various characteristics, human nature and habit, all entering into it.

Senator NORRIS. Supposing we pass this law before us, if it becomes a law as you want it, and the case arises which Senator Walsh has suggested, with the modification I have put into it, you would be entitled to an injunction with this law on the statute books.

Mr. MARTIN. I think you would, in particular cases.

Senator SHIPSTEAD. If there was no other relief, you would not have relief in an action for damages; you would not have a remedy at law.

Mr. MARTIN. I think some States require that.

Senator NORRIS. I think we can agree on this proposition of law Senator Walsh suggested, with the limitation of reasonable time, that under the existing law you would be entitled to an injunction; but, supposing we passed this law, would you then be entitled to an injunction?

Mr. MARTIN. I think you would. I think that is so connected with the——

Senator NORRIS (interposing). Isn't that excluded by the definition you have made for property?

Mr. MARTIN. I think Senator Walsh's statement answers that question. It is suggested, whose good will do you transfer? You can not transfer a good will which is a latent state of mind, but in an established business you transfer it.

Senator WALSH. That is just the point I am making; there does not seem to be anything that is transferable, but yet it seems quite obvious it is a proper case for injunction.

Mr. MARTIN. I think it is; it is found in the fact that such good will is inseparable from the business.

Senator WALSH. The good will being the state of mind in a business, and the disposition of a large number of clients built up by that particular class of good will, of course, is quite different from a man who owns a business; that state of mind can not be transferred at all.

Mr. MARTIN. No.

Senator WALSH. So that whatever there is there, it is not transferable.

Mr. MARTIN. But, when he sells his business, that is the sale of a thing that is inseparably connected with it, the fact that it is a going concern.

Senator WALSH. That deals with the physical assets and the fact that the business is a going concern.

Senator SHIPSTEAD. In the matter of good will, is there not more or less confusion of terms, in stating a thing that is really transferred, which is called "good will," such as machinery and the channels by which the business may come in contact with those who are transacting the business, and the attitude of mind toward dealing with the concern?

Mr. MARTIN. I think so; and I do not think if this injunction law passes that those cases would be affected, because here the attack upon the good will of that business does not reach the customers to prevent those persons from dealing with the continued interrupted flow of business.

Senator WALSH. I simply wanted to grasp that concept of a new definition of property from the year 1890. You will pardon me for breaking in.

Mr. MARTIN. Yes. Well, sir, you will find cases, if you will cause searches to be made of those decisions, where they did not issue the injunction before that time and did not discuss the right of labor as property, but as a privilege, a mere privilege that can be built up under an accumulative process——

Senator WALSH (interposing). I quite appreciate that; I can understand that very well, but I did not quite see how this related to the new definition of property.

Mr. MARTIN. Well, only this, that they could never have reached out to prevent the exercise of these rights unless they did regard it as property.

Senator WALSH. I call your attention to the fact that injunctions were issued prior to 1890 in cases where property rights were involved.

Mr. MARTIN. I think the first one was issued in 1840, in New York, touching boycotting, and later in 1860 or 1870. It is apparently a new thought, to direct the issuance of an injunction to the continued right of the labor of men.

You did find them dealing with these incorporeal rights prior to 1890.

Now, in this Duplex case, I want to call your attention to the dissenting——

Senator WALSH (interposing). Will you pardon me for just another interruption?

Mr. MARTIN. Yes, sir.

Senator WALSH. Under this right to have property moved in interstate commerce, particularly from one State to another, before the Constitution was adopted, there was no such right as that.

Mr. MARTIN. No.

Senator WALSH. Each State could exclude the products of every other State if it saw fit to do so.

Mr. MARTIN. Yes, sir.

Senator WALSH. Well, can you then speak of this right to move from one State to another as a property right at all?

Mr. MARTIN. I do not think you can.

Senator WALSH. That is a right Congress could take away from them.

Mr. MARTIN. I think so.

Senator WALSH. The Constitution forbids even Congress to deprive a man of his property without due process of law; and, of course, in all these cases injunctions are issued to protect that right of moving property in interstate commerce, so I think it is easily demonstrable that the right to move property in interstate commerce is not a property right. That is a right granted by statutory or constitutional amendment, so there is another case in which injunctions are issued not to protect the property at all, but to protect a right to remove the property.

Mr. MARTIN. That is true.

Senator WALSH. It seems to me to change the definition of property would not in anywise affect the issuance of an injunction to protect that right, seeing that it is not property.

Mr. MARTIN. It seems to me that the right to remove property in interstate commerce is a question almost on the same basis as the right of the continued habit to deal with you; it is so inseparably connected with the thing itself—a fair and proper exercise of the right to protect the physical thing which moves in interstate commerce.

Now, that thing moves in interstate commerce and comes to rest; and as long as the act is directed to that thing, touching it, to prevent the uninterrupted flow from that place to this place [illustrating], across State lines, is so much a part of the thing itself, a right to possess the thing, that it is an intangible right; it is a right attached to that commodity, and the Congress may properly protect it by injunction, and I think that right is a transferable right. I think that comes within the definition.

Senator WALSH. I simply raised the question with reference to the definition of property that you seek to reach.

Mr. MARTIN. It seems to us that is or would come within the definition of property in its truest sense.

Senator NORRIS. Can you conceive of being able to transfer anything if it is not property?

Mr. MARTIN. The proper conception of property is that it should be capable of transfer.

Senator NORRIS. Whatever we may call this right, whether it is property or anything else. If it is true that you can not transfer something that is not property, then it seems to me it must follow when you transfer your business that it is property, because you do

transfer it. Courts will prevent, by injunction, the man who sold it to you from violating his contract by going into the same business within a reasonable length of time. If that be true, then I should think it would follow if we pass that law, in the case we have been talking about, that you would still be entitled to an injunction, just as you are now.

Mr. MARTIN. I think you would.

Senator NORRIS. Without going into any nicety of what is property and what is not, the facts are that you have transferred something.

Mr. MARTIN. Yes, sir.

Senator NORRIS. And the court protects you in it, and therefore it is transferable.

Mr. MARTIN. Yes, sir.

Senator NORRIS. And if it is transferable, then this proposed bill would protect it.

Mr. MARTIN. Yes, sir.

Now, let me read a moment from this Duplex case, from the dissenting opinion by Justice Brandeis [reading]:

As to the rights at common law: Defendants' justification is that of self-interest. They have supported the strike at the employer's factory by a strike elsewhere against its product. They have injured the plaintiff, not maliciously, but in self-defense. They contend that the Duplex Co.'s refusal to deal with the machinists' union and to observe its standards threatened the interests not only of such union members as were its factory employees, but even more of all members of the several affiliated unions employed by plaintiff's competitors and by others whose more advanced standards the plaintiff was, in reality, attacking; and that none of the defendants and no person whom they are endeavoring to induce to refrain from working in connection with the setting-up of presses made by plaintiff is an outsider and interloper. In other words, that the contest between the company and the machinists' union involves vitally the interest of every person whose cooperation is sought. May not all with a common interest join in refusing to expend their labor upon articles whose very production constitutes an attack upon their standard of living and the institution which they are convinced supports it? Applying common law principles the answer should, in my opinion, be: Yes, if as a matter of fact those who so cooperate have a common interest.

When centralization in the control of business brought its corresponding centralization in the organization of working men, new facts had to be appraised. A single employer might, as in this case, threaten the standing of the whole organization and the standards of all its members; and when he did so the union, in order to protect itself, would naturally refuse to work on his materials wherever found. When such a situation was presented to the courts, judges concluded that the intervention of the purchaser of the materials established an insulation through which the direct relationship of the employer and the working men did not penetrate; and the strike against the material was considered a strike against the purchaser by unaffected third parties.

But other courts, with better appreciation of the facts of industry, recognized the unity of interest throughout the union, and that, in refusing to work on materials which threatened it, the union was only refusing to aid in destroying itself.

So, in the case at bar, deciding a question of fact upon the evidence introduced and matters of common knowledge, I should say, as the two lower courts apparently have said, that the defendants and those from whom they sought cooperation have a common interest which the plaintiff threatened. This view is in harmony with the views of the Court of Appeals of New York. For in New York, although boycotts like that in Loewe *v.* Lawler, are illegal because they are conducted not against the product but against those who deal in it and are carried out by a combination of persons not united by common interest but only by sympathy; it is lawful for all members of a union by whomever employed to refuse to handle materials whose production weakens the union.

The voluntary adoption of a rule not to work on nonunion made material and its enforcement differs only in degree from such voluntary rule and its enforcement in a particular case. Such a determination also differs entirely from a general boycott of a particular dealer or manufacturer with a malicious intent and purpose to destroy the good will or business of such dealer or manufacturer.

Now, I do not want to take up more time, Mr. Chairman; it is after 12 o'clock. I will conclude, Mr. Chairman, by saying this, that in the Truax case the court (the opinion by a divided court), came to the conclusion that section 20 of the Clayton Act is not invalid, but that the statutes adopted by the State of Arizona were illegal and deprived those persons of their property rights.

Senator NORRIS. It is after 12 o'clock. Both of us have to be on the floor of the Senate, and we will have to go.

Mr. MARTIN. Mr. Chairman, I thank you for giving me this opportunity of being heard, and I trust that I have been able to offer some things to the committee which may be useful.

I thank you.

(Whereupon, at 12.05 p. m., March 22, 1928, the hearing was concluded.)